(17,337.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 242.

C. W. SMITH, AS RECEIVER OF THE ATLANTIC AND PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

TRUMAN REEVES, AS TREASURER OF THE STATE OF CALIFORNIA.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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1 In the Circuit Court of the United States for the Northern District of California.

J. W. REINHART, JOHN J. McCOOK, and JOSEPH C. WILSON, as Receivers of the Atlantic & Pacific Railroad Company, Plaintiffs,

vs.

J. R. McDONALD, as Treasurer of the State of California, Defendant.

Complaint.

I.

The plaintiffs allege and show to the court that the Atlantic & Pacific Railroad Company is now and for a long time last past has been a corporation duly incorporated under an act of the Congress of the United States of America approved July 27th, 1866, and that it now has and for over five years last past has had in operation under said act of Congress a line of railroad from the city of Albuquerque, in the county of Bernalillo, in the Territory of New Mexico, to Mojave, in the county of Kern and State of California.

II.

That in January, 1894, in actions then pending in each of said hereinafter-named courts, wherein The Mercantitle Trust Company of New York was and is plaintiff and The Atlantic & Pacific Railroad Company was and is defendant, these plaintiffs were
2 duly appointed by the district court of the second judicial district of the Territory of New Mexico receivers of the said Atlantic & Pacific Railroad Company and of its property and effects within the Territory of New Mexico, and that immediately thereafter and in the same month they were duly appointed by the district court of the fourth judicial district, in the Territory of Arizona, receivers of said railroad company and its property in the Territory of Arizona, and that thereafterwards and during the same month they were duly appointed receivers of the said railroad company and its property located in the southern district of the State of California by the circuit court of the United States in and for said district, and that thereafterwards and during said month they were duly appointed by the United States circuit court for the northern district of the State of California receivers of the property of said railroad company in said district.

III.

That thereafterwards the plaintiffs duly qualified as such receivers and entered upon the discharge of their duties as such receivers under and by virtue of said various appointments, and that they are now and for more than two months last past have been

the duly appointed, qualified, and acting receivers of said railroad company, having received from it all of its rights, property, and choses in action.

IV.

That up to and prior to August, 1884, the Atlantic & Pacific Railroad Company had constructed and had under operation under its charter a line of railroad from Isleta, Bernalillo county, New Mexico, through the territory of Arizona to the Colorado river, on the eastern boundary of the State of California, between the 34th and 35th parallel of latitude, at a point on the eastern boundary of said river near the town of Needles, California.

That at the date referred to last aforesaid the Southern Pacific Railroad Company, a corporation duly incorporated at that time under the laws of the State of California under and pursuant to the 18th section of the act of Congress above referred to and approved July 27th, 1866, and the joint resolution of the Congress of the United States approved June 28th, 1870, had built, constructed, and had in operation from the town of Mojave, in the county of Kern, in the State of California, a line of railroad eastward to the eastward line of the Colorado river, at a point where it would form a junction with the line of the Atlantic & Pacific railroad, as aforesaid; that on the 20th day of August, A. D. 1884, the said Southern Pacific Railroad Company, the Atlantic & Pacific Railroad Company, the St. Louis & San Francisco Railway Company, a corporation duly incorporated and organized under the laws of the State of Missouri, and the Atchison, Topeka & Santa Fe Railroad Company, a corporation incorporated, organized, and existing under the laws of the State of Kansas, made and entered into an agreement, whereby and by the terms of which the Southern Pacific Railroad Company was party of the first part, and the Alantic & Pacific Railroad Company was party of the second part, and the other two companies parties of the third and fourth parts; that the first and second clauses contained in said contract were and are as follows:

"First. The party of the first part has agreed to sell to the party of the second part, and the party of the second part has agreed to purchase from the party of the first part the said line of railway of the party of the first part from the west end of the bridge over the Colorado river at or near the Needles, in the State of California two hundred and forty-two and thirty-seven one-hundredths miles or thereabouts, to the easterly margin of the grounds or yards of the party of the first part, used in connection with the Mojave Junction station, or with the main line of road of said party of the first part between Goshen and Yuma, together with the right of way of said railroad company therefor, two hundred feet in width, and the switches, sidings and turnouts, and the station buildings, section-houses, turn-tables and other appurtenances to said line of railway (except that this is not to be construed to include equipment or to interfere with the right of way and depot grounds of the party of

the first part at the said Mojave junction, but the party of the second part is to have the right to make a physical connection between its tracks and the tracks of the party of the first part at that point), at and for the price of thirty thousand dollars a mile of said railway, that is to say, seven million two hundred and seventy-one thousand one hundred dollars ($7,271,100), of which purchase price one-sixth part thereof, that is to say, one million two hundred eleven thousand, eight hundred and fifty dollars ($1,211,850), is to be paid by the party of the second part to said party of the first part in cash, and the remainder thereof, viz: six million and fifty-nine thousand two hundred and fifty dollars ($6,059,250), is to be paid by said party of the second part to said party of the first part, either in cash, or in first-mortgage six per cent. bonds of the party of the second part, issued under and secured by its first mortgage bearing date first day of July, 1880, and the prompt payment of the principal and interest of which shall have been legally guaranteed by the parties of the third and fourth parts respectively; it being understood and agreed that such sale is to be consum-ated and the purchase price of such line of railway paid whenever the party of the first part is able to make clear title to said line of railway, discharged from the lien of its first mortgage bearing date the first day of April, 1875, hereinbefore referred to, and from all other liens existing thereon at the day of the date of these presents, or which may be imposed thereon by the party of the first part at any time from the day of the date of these presents to the consummation of such sale.

"Second. In the meantime, and until the consummation of such sale and payment of the purchase price as aforesaid, the party of the first part has leased and demised to said party of the second part, and said party of the second part has hired from said party of the first part, from the first day of October, 1884, the said line of railway from the west end of the bridge over the Colorado river to such easterly margin of such grounds or yards of the party of the first part as above described, together with the other appurtenances thereto hereinbefore agreed to be sold (but excluding equipment), at and for the annual rental of eighteen hundred dollars per mile of such railway, to wit: four hundred and thirty-six thousand two hundred and sixty-six dollars ($436,266), payable semi-annually during the continuance of such lease, and the said party of the second part has covenanted and agreed and hereby covenants and agrees to and with said party of the first part, that the said party of the second part will, and its successors and assigns shall, pay to the said party of the first part, its successors and assigns, as rental for such line of railway and appurtenances, until the time of the consummation of such sale and the payment of the purchase price thereof as aforesaid, the sum of two hundred and eighteen thousand one hundred and thirty-three dollars ($218,133), on the first day of April and October in each and every year, and that it, the said party of the second part will, and its successors and assigns shall, further promptly pay and discharge all taxes and assessments which shall hereafter become due upon said

property or any part thereof, or may become in any wise due or owing in respect to the same, and will maintain, repair and replace such property so that the same may, at all times, be and remain in substantially as good plight and condition as that in which it now is, the nature and character of the property being considered."

That under and by virtue of said contract and the clauses hereinabove set forth, therein contained, the Atlantic & Pacific Railroad Company, on the first day of October, 1884, entered into the
7 actual, sole, and exclusive possession of all that line of railroad from the town of Mojave, in the county of Kern, to the Colorado river, in the county of San Bernardino, in said State of California; that the said railroad so acquired from the Southern Pacific Railroad Company by the Atlantic & Pacific Railroad Company under the provisions of said contract was and ever since has been 242.50 miles in length.

That at the time of making and entering into said contract hereinabove referred to and ever since said time the Southern Pacific Railroad Company, as the plaintiffs are informed and believed, owned and operated in the State of California under its name about 1,000 miles of railroad in said State, including the line covered by said contract, as aforesaid; that during the years 1888, 1889, 1890, 1891, 1892, and 1893 the Southern Pacific Railroad Company has returned to the State board of equalization of the State of California a statement of the property owned by said company in said State for the purpose of having the State board of equalization assess the same for taxation for said years; that said return has always included in the mileage given the railroad so sold and leased to the Atlantic & Pacific Railroad Company under the terms of said contract of August 20, 1884, as aforesaid, and that during each of those years the State board of equalization has apportioned the entire value of all the personal property of the said Southern Pacific Railroad Company, consisting of cars, locomotive engines, and other property of that character, along the entire mileage of said road, returned by it to said State board as aforesaid, and has divided the total value of the road-bed, the rails, rolling stock, and all
8 things which the State board of equalization had a right to assess, by the total mileage of said road, including the line from Mojave to the Colorado river, as aforesaid, and made an assessment at so much per mile of said road, based on the result of such division, which has not been less, as plaintiffs are informed and believe, than ten thousand dollars ($10,000) a mile for each of those years, except as hereinafter stated; that for the year 1893 the State board assessed the Southern Pacific Railroad Company at the rate of $9,303.95 per mile on the total mileage of said railroad company in the State of California, and that that assessment included the value of all rolling stock, cars, engines, and personal property of every description owned by the Southern Pacific Railroad Company which could be assessed in connection with the operation of its road in said State, it running into and through several counties therein, and that said assessment included the 242.51 miles of road from Mojave to the Colorado river covered by the contract of August

20th, 1884, as aforesaid; that notwithstanding said fact the State board of equalization of the State of California did, in the year 1893, demand and require of the Atlantic & Pacific Railroad Company that it should make a return to it of all its personal property in the shape of rolling stock, &c., used in the operation of the line of road from the Colorado river to Majave, acquired by the Southern Pacific under said contract, and that thereupon, and under protest, the Atlantic & Pacific Railroad Company returned to the said State board that it had in operation eighty-nine cars and locomotive engines of the value of
9 $56,810, which it had in use and operation at times along the line of said road so acquired by said contract, as aforesaid; that thereupon the said State board of equalization assessed said rolling stock at a total valuation of $125,000, or $515.44 a mile, notwithstanding the fact that the same board had assessed the line of railroad on which said rolling stock was used to the Southern Pacific Railroad Company, together with its *pro rata* share of said railroad's personal property, including rolling stock, at the rate of $9,303.95; that the State board of equalization first assessed said line of road to the Southern Pacific Railroad Company, as aforesaid, and included in said assessment the average value of the entire rolling stock of the Southern Pacific per mile, so that the total assessment of said line was $9,303.95 per mile, including its *pro rata* share of rolling stock aforesaid, and then said board assessed the Atlantic & Pacific Railroad Company upon the same mileage the sum of $515.44 per mile for rolling stock only.

That the State board thereupon levied upon said assessment against the Atlantic & Pacific Railroad Company a total tax of $2,272.80, and that it also levied against the Southern Pacific Railroad Company for the same line of railroad a total tax of $33,981.58; that during the year 1893 the cars and locomotive engines assessed by the Atlantic & Pacific Railroad Company upon said line of railroad were through cars running over said line of railroad from the east and from the west, the passenger cars originating in Chicago, in the State of Illinois, and in Albuquerque, in the Territory
10 of New Mexico, and in San Diego, Los Angeles, and San Francisco, in the State of California; that during all of said time the Atlantic & Pacific Railroad Company, through contract, formed a part of a through transcontinental system between Chicago, Illinois, in the East, and Los Angeles, San Diego, and San Francisco, in the State of California, and that the cars operated over said line of railroad in California were to a very large extent through cars, running on through trains, and none of said cars were locally kept all the time upon said line of railroad, and none were kept stationery in the State of California or in said State at all, except when in operation and running over that portion of the track of the Atlantic & Pacific Railroad Company located therein; that during the year 1893 the Atlantic & Pacific Railroad Company returned all of its rolling stock owned by it and subject to taxation for assessment and taxation to the proper authorities in the county of Bernalillo and Territory of New Mexico, that being the headquarters of said rail

road company, where its eastern terminus was and is, and the situs of all of its property outside of its track, right of way, and stations; that on the 27th day of March, 1894, these plaintiffs, for the Atlantic & Pacific Railroad Company and as receivers of it, paid the second half of installment of the taxes for the year 1893, so levied by the said State board of equalization, as aforesaid, to the treasurer of the State of California, and prior to the commencement of this action all of said taxes so levied, as aforesaid, amounting to the aforesaid sum of $2,272.80, were duly paid to said State treasurer; that prior to
11 the commencement of this action and prior to the first day of June, 1894, these plaintiffs, as such receivers, gave notice, in writing, to the controller of the State of California that they intended to bring an action against the treasurer of the State of California to recover the taxes so levied and assessed, as aforesaid, and paid by the Atlantic & Pacific Railroad Company to said State treasurer; which said notice in all respects *in all respects* conformed with the requirements of the statute. A true and correct copy of the same is hereto attached, marked Exhibit "A," and made a part hereof; that the making of said assessment and the levy of said taxes on the rolling stock of the Atlantic & Pacific Railroad Company by said State board of equalization for the year 1893 was unauthorized by law, illegal, and void, by reason of the facts aforesaid; that the Southern Pacific has paid the taxes levied on said line, as aforesaid.

Wherefore these plaintiffs demand judgment against said defendant, as the treasurer of the State of California, for the sum of $2,272.80, with interest thereon from the date of the payment of said sum or any portion thereof to the State treasurer, together with the costs of this action.

C. N. STERRY,
Attorney for Plaintiffs.

E. S. PILLSBURY, *Of Counsel.*

12 EXHIBIT "A."

ALBUQUERQUE, N. M., *March* 28, 1894.

To the comptroller of the State of California, Sacramento, California:

You will please take notice that J. W. Reinhart, John J. McCook, and Joseph C. Wilson, the receivers who have been duly appointed as receivers of the Atlantic & Pacific Railroad Company, of all its rights and property, and who since such appointment have duly qualified and entered upon the discharge of the duties of their office and taken possession of said railroad, of all its property and rights in action, intend to bring an action against the State treasurer of the State of California to recover from said State treasurer the sum of twenty-two hundred and seventy-two dollars and $\frac{80}{100}$ ($2,272.80), the amount of tax- paid by the Atlantic & Pacific Railroad Company and by the receiver for it to the State treasurer as and for taxes assessed against the Atlantic & Pacific Railroad Company in the

State of California for the year 1893 by the State board of equalization of said State.

Respectfully,

J. W. REINHART,
JOHN J. McCOOK, AND
JOSEPH C. WILSON,
By C. N. STERRY,
Their Attorney.

13 I hereby acknowledge that the original of the above and foregoing notice was delivered to me, at Sacramento, California, on the 2nd day of April, 1894, and filed on said date.

E. P. COLGAN,
State Comptroller.

(Endorsed:) Filed May 23, 1894. W. J. Costigan, clerk, by W. B. Beaizley, deputy clerk.

14 *Summons.*

UNITED STATES OF AMERICA:

Circuit Court of the United States, Ninth Circuit, Northern District of California.

J. W. REINHART, JOHN J. McCOOK, and JOSEPH C. WILSON, as Receivers of the Atlantic & Pacific Railroad Company, Plaintiffs,

v.

J. R. McDONALD, as Treasurer of the State of California, Defendant.

Action brought in the said circuit court and the complaint filed in the office of the clerk of said circuit court in the city and county of San Francisco.

The President of the United States of America to J. R. McDonald, as treasurer of the State of California, defendant, Greeting:

You are hereby required to appear in an action brought against you by the above-named plaintiff in the circuit court of the United States, ninth circuit, in and for the northern district of California, and to file your plea, answer, or demurrer to the complaint filed therein (a certified copy of which accompanies this summons) in the office of the clerk of said court, in the city and county of
15 San Francisco, within thirty days after the service on you of this summons, or judgment by default will be taken against you.

The said action is brought to recover from you, said defendant, the sum of $2,272.80, alleged to be due from you to plaintiffs, and which said sum was received by you from plaintiffs in payment of certain taxes assessed and levied for the year 1893, the making of the assessment under which said taxes were levied & the levy of said taxes being claimed by plaintiffs to be unauthorized by law,

illegal, and void. Plaintiffs also demand interest and costs of suit; all of which is more fully set out in the original complaint on file herein, to which reference is hereby made; and if you fail to appear and plead, answer or demur, as herein required, your default will be entered and the plaintiff will apply to the court for the relief demanded in the complaint.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 23d day of May, in the year of our Lord one thousand eight hundred and ninety-four, and of our Independence the 118th.

[SEAL.]

W. J. COSTIGAN, *Clerk*,
By W. B. BEAIZLEY,
Deputy Clerk.

(Endorsed:)

UNITED STATES MARSHAL'S OFFICE,
Northern District of California.

16 I hereby certify that I received the within writ on the 29th day of May, 1894, and personally served the same on the 31st day of May, 1894, on J. R. McDonald, treasurer of the State of California, by delivering to and leaving with J. R. McDonald, treasurer of the State of California, said defendant named therein, at the county of Sacramento, in said district, an attested copy thereof, together with a certified copy of the complaint, certified to by the clerk of the court, attached thereto.

W. G. LONG, *U. S. Marshal*,
By S. P. MONCKTON, *Deputy.*

San Francisco, June 1st, 1894.

(Endorsed:) Filed June 1st, 1894. W. J. Costigan, clerk, by W. B Beaizley, deputy clerk.

17 In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

J. W. REINHART, JOHN J. McCOOK, and JOSEPH C. WILSON, as Receivers of the Atlantic & Pacific Railroad Company, Plaintiffs,

vs.

J. R. McDONALD, as Treasurer of the State of California, Defendant.

Demurrer to Complaint.

The demurrer of J. R. McDonald, as treasurer of the State of California, to the bill of complaint of J. W. Reinhart, John J. McCook, and Joseph C. Wilson, as receivers of the Atlantic and Pacific Railroad Company.

This defendant, by protestation, not confessing or acknowledging all or any of the matters or things in the said bill of complaint contained to be true in such manner and form as the same are herein set forth and alleged, doth demur to the said bill, and for causes of demurrer showeth:

I. That it appeareth by the plaintiffs' own showing by the said bill that they are not entitled to the relief prayed by the bill against this defendant.

II. That it appeareth by plaintiffs' own showing by the
18 said bill of complaint that they are not entitled to the relief prayed for by the bill of complaint against this defendant, in that said bill shows that said Atlantic and Pacific Railroad Company was properly assessed upon the rolling stock mentioned in said bill of complaint, and it does not appear by the said bill that said plaintiffs have paid other than as set forth in said complaint or are willing to pay whatever may be justly payable to the State of California for taxes for the year mentioned in said bill of complaint.

III. That it appeareth by the plaintiffs' own showing by the said bill that said bill does not state facts sufficient to constitute a cause of action against this defendant, either in his individual or in his official capacity.

IV. That it appears by the said bill that there is another person or corporation who or which is a necessary party to the said bill, but are not made parties thereto.

V. It appears by the said bill that the said Southern Pacific Railroad Company is a party to the contract referred to and set forth in part in said bill of complaint, and that said company is interested in the matter in dispute in this action to the extent that it is charged that any assessment, if wrongfully made, was caused so to be made by the said Southern Pacific Railroad Company, and not by the State board of equalization of the State of California; and it further appears that the said Southern Pacific Railroad Company is not made a party hereto.

And it further particularly appears that said Southern Pacific Railroad Company has paid all the taxes levied against it on
19 its property, as alleged in said complaint, including the line of road operated by said plaintiffs, and that the rolling stock of said Atlantic and Pacific Railroad Company upon said 242.51 miles of road, mentioned in said bill of complaint as lying wholly in said State of California and operated by said plaintiffs, which said rolling stock, as shown by said bill of complaint, is permanently operated upon said 242.51 miles of road, is assessed to said Atlantic and Pacific Railroad Company and was so properly assessed to said company, and therefore said plaintiffs are not entitled to any relief on account of the assessment of said rolling stock.

Wherefore, and for divers other good causes of demurrer appearing on the said bill, this defendant doth demur thereto, and he prays the judgment of this honorable court whether he shall be compelled to make any answer to the said bill, and he humbly prays to be hence dismissed with his reasonable costs in this behalf sustained.

WM. H. H. HART,

Attorney General, Solicitor for the Defendant, J. R. McDonald, as Treasurer of the State of California, 305 Larkin Street, San Francisco, Cal.

I hereby certify that the foregoing demurrer is, in my opinion, well founded in point of law.

WM. H. H. HART,
Of Counsel for Defendant, J. R. McDonald, as Treasurer of the State of California.

STATE OF CALIFORNIA,
City and County of San Francisco, Northern District of California, } ss:

W. H. H. Hart, being duly sworn, deposes and says that he is the attorney general of the State of California and officially represents the defendant in the above-entitled action as solicitor and as of counsel; that said defendant is absent from the city and county of San Francisco and resides in Sacramento, California, and that it is inconvenient for him to make this affidavit.

This affiant further deposes and says that the foregoing demurrer is not interposed for delay.

WM. H. H. HART.

Sworn to before me this 3d day of October, 1894.

ALBERT BETZ,
Phonographic Reporter for the Attorney General.

(Endorsed:) Service of a copy of the within demurrer admitted this 3d day of October, 1894. E. S. Pillsbury, attorney for plaintiffs. Filed Oct. 3, 1894. W. J. Costigan, clerk, by W. B. Beaizley, deputy clerk.

In the Circuit Court of the United States for the Northern District of California.

J. W. REINHART ET AL., as Receivers, etc., Plaintiffs,
vs.
J. R. McDONALD, as Treasurer of the State of California, Defendant. } No. 11915.

Motion to Dismiss Cause.

To the above-named plaintiffs and to their attorney and counsel, C. N. Sterry, Esq., and E. S. Pillsbury, Esq.:

Please take notice that on Monday, the 27th day of May, 1895, at the hour of eleven o'clock a. m., or as soon thereafter as counsel can be heard, the above-named defendant, by his counsel, will move this honorable court, at the court-room thereof, in the United States Appraisers' building, city and county of San Francisco, State of California, to dismiss the above-entitled action on the following grounds, to wit:

1. That the court has no jurisdiction of the person of this defendant.
2. That the court has no jurisdiction of the action.

Said motion will be made upon the papers and pleadings on file in this action.

22 W. F. FITZGERALD,
Attorney General, Counsel for Defendant.

(Endorsed:) Service of copy of the within notice admitted this 14th day of May, 1895. C. N. Sterry, E. S. Pillsbury, att'ys for plaintiffs. Filed May 14th, 1895. W. J. Costigan, clerk.

At a stated term, to wit, the July term, A. D. 1896, of the circuit court of the United States of America of the ninth judicial circuit in and for the northern district of California, held at the court-room, in the city and county of San Francisco, on Monday, the 17th day of August, in the year of our Lord one thousand eight hundred and ninety-six.

Present: The Honorable Joseph McKenna, circuit judge.

J. W. REINHART, &c., ET AL.
vs.
J. R. McDONALD, Treasurer, &c. } No. 11915.

Order Sustaining Demurrer and Denying Motion to Dismiss.

23 The demurrer of defendant to plaintiffs' complaint and the motion of defendant to dismiss, heretofore submitted herein, having been fully considered, and the opinion of the court having been filed, it is, in accordance with said opinion, ordered that said demurrer be, and hereby is, sustained, with leave to plaintiffs to amend their complaint within 20 days if so advised; and it is further ordered that said motion to dismiss be, and the same hereby is, denied.

24 In the Circuit Court of the United States for the Northern District of California.

C. W. SMITH, Successor to J. W. Reinhart, John J. McCook, and Joseph C. Wilson, as Receivers of the Atlantic and Pacific Railroad Company, and Receiver of the Atlantic and Pacific Railroad Company, Plaintiff,
vs.
LEVI RACKLIFFE, as Successor in Office to J. R. McDonald, as Treasurer of the State of California, Defendant.

Amended Complaint.

I.

The plaintiff alleges and shows to the court that the Atlantic and Pacific Railroad Company is now, and for a long time last past has been, a corporation duly incorporated under an act of the Congress of the United States of America, approved July 27th, 1866, and that it now has, and for over five years last past has had in operation

under said act of Congress a line of railroad from the city of
25 Albuquerque, in the county of Bernalillo, in the Territory of New Mexico, to Mojave, in the county of Kern and State of California.

II.

That in January, 1894, in actions then pending in each of said hereinafter-named courts, wherein The Mercantile Trust Company of New York was and is plaintiff, and The Atlantic and Pacific Railroad Company was and is defendant, the former plaintiffs were duly appointed by the district court of the second judicial district of the Territory of New Mexico receivers of the said Atlantic and Pacific Railroad Company, and of its property and effects, within the Territory of New Mexico, and that immediately thereafter, and in the same month, they were duly appointed by the district court of the fourth judicial district in the Territory of Arizona receivers of said railroad company and its property in the Territory of Arizona; and that thereafter, and during the same month, they were duly appointed receivers of the said railroad company and its property located in the southern district of the State of California, by the circuit court of the United States in and for said district; and that thereafter, and during said month, they were duly appointed by the United States circuit court of the northern district of the State of California receivers of the property of said railroad company in said district.

III.

That thereafter the former plaintiffs duly qualified as such
26 receivers, and entered upon the discharge of their duties as such receivers under and by virtue of said various appointments, and that the former plaintiffs continued as such receivers until the fall of 1894, when J. W. Reinhart resigned in each of said courts as such receiver, and that thereupon A. F. Walker was, in each of said courts, duly appointed receiver in the place of the said J. W. Reinhart, and that he thereupon entered upon the discharge of his duties as such receiver; that in the fall of 1895 Joseph C. Wilson, one of said receivers, died, and that the vacancy occasioned by his death was not afterwards filled except as hereinafter stated; that on and prior to the 1st day of February, 1896, A. F. Walker and John J. McCook, the surviving receivers, resigned in each of said courts wherein they were appointed, and their resignations were duly accepted, and that thereupon in each of said courts, in said causes of action aforesaid, C. W. Smith was appointed receiver of the Atlantic and Pacific Railroad Company and its property, and that thereupon he duly qualified in each of said jurisdictions as such receiver, and that he is now, and since the 1st day of February, 1896, has been, the sole and only receiver of the Atlantic and Pacific Railroad Company in each of the jurisdictions aforesaid, and since said date has had full and exclusive possession of the property of said Atlantic and Pacific Railroad Company, and is the successor in interest of the original receivers appointed as aforesaid.

IV.

That up to and prior to August, 1894, the Atlantic and Pa-
27 cific Railroad Company had constructed and had under operation under its charter a line of railroad from Isleta, Bernalillo county, New Mexico, through the Territory of Arizona, to the Colorado river, on the eastern boundary of the State of California, between the 34th and 35th parallel of latitude, at a point on the eastern boundary of said river near the town of Needles, California, a distance of some 577 miles.

That at the date referred to last aforesaid the Southern Pacific Railroad Company, a corporation duly incorporated at that time under the laws of the State of California, under and pursuant to the 18th section of the act of Congress above referred to, and approved July 27th, 1866, and the joint resolution of the Congress of the United States approved June 28th, 1870, had built, constructed, and had in operation from the town of Mojave, in the county of Kern, in the State of California, a line of railroad eastward to the westward line of the Colorado river, at a point where it would form a junction with the line of the Atlantic and Pacific railroad as aforesaid. That on the 20th day of August, A. D. 1884, the said Southern Pacific Railroad Company, the Atlantic and Pacific Railroad Company, the St. Louis and San Francisco Railway Company, a corporation duly incorporated and organized under the laws of the State of Missouri, and the Atchison, Topeka and Santa Fe Railroad Company, a corporation incorporated, organized, and existing under the laws of the State of Kansas, made and entered into an agreement, whereby and by the terms of which the Southern Pacific Railroad Company was party of the first part, and the At-
28 lantic and Pacific Railroad Company was party of the second part, and the other two companies parties of the third and fourth parts; that the first and second clauses contained in said contract were and are as follows:

"First. The party of the first part has agreed to sell to the party of the second part, and the party of the second part has agreed to purchase from the party of the first part, the said line of railway of the party of the first part from the west end of the bridge over the Colorado river at or near the Needles, in the State of California, two hundred and forty two and thirty-seven one-hundredths miles, or thereabouts, to the easterly margin of the grounds or yards of the party of the first part, used in connection with the Mojave Junction station, or with the main line of road of said party of the first part between Goshen and Yuma, together with the right of way of said railroad company therefor, two hundred feet in width, and the switches, sidings, and turnouts, and the station buildings, section-houses, turn-tables, and other appurtenances to said line of railway (except that this is not to be construed to include equipment, or to interfere with the right of way and depot grounds of the party of the first part at the said Mojave junction, but the party of the second part is to have the right to make a physical connection between its tracks and the tracks of the party of the first part at that point),

at and for the price of thirty thousand dollars a mile of said railway; that is to say, seven million two hundred and seventy-one thousand one hundred dollars ($7,271,100), of which purchase price one-sixth part thereof, that is to say, one million two hundred
29 eleven thousand eight hundred and fifty dollars ($1,211,850), is to be paid by the party of the second part to said party of the first part in cash, and the remainder thereof, viz., six million and fifty-nine thousand two hundred and fifty dollars ($6,059,250), is to be paid by said party of the second part to said party of the first part, either in cash or in first-mortgage six per cent. bonds of the party of the second part, issued under and secured by its first mortgage bearing date first day of July, 1880, and the prompt payment of the principal and interest of which shall have been legally guaranteed by the parties of the third and fourth parts respectively; it being understood and agreed that such sale is to be consummated and the purchase price of such line of railway paid whenever the party of the first part is able to make clear title to said line of railway, discharged from the lien of its first mortgage, bearing date the first day of April, 1875, hereinbefore referred to, and from all other liens existing thereon at the day of the date of these presents, or which may be imposed thereon by the party of the first part at any time from the day of the date of these presents to the consummation of such sale.

"Second. In the meantime, and until the consummation of such sale and payment of the purchase price as aforesaid, the party of the first part has leased and demised to said party of the second part, and said party of the second part has hired from said party of the first part, from the first day of October, 1884, the said line of railway from the west end of the bridge over the Colorado river to such easterly margin of such grounds or yards of the party
30 of the first part as above described, together with the other appurtenances thereto hereinbefore agreed to be sold (but excluding equipment), at and for the annual rental of eighteen hundred dollars per mile of such railway, to wit, four hundred and thirty-six thousand two hundred and sixty-six dollars ($436,266), payable semi-annually during the continuance of such lease, and the said party of the second part has covenanted and agreed, and hereby covenants and agrees to and with said party of the first part, that the said party of the second part will, and its successors and assigns shall, pay to the said party of the first part, its successors and assigns, as rental for such line of railway and appurtenances, until the time of the consummation of such sale and the payment of the purchase price thereof as aforesaid, the sum of two hundred and eighteen thousand one hundred and thirty-three dollars ($218,133), on the first day of April and October in each and every year, and that it, the said party of the second part, will, and its successors and assigns shall, further promptly pay and discharge all taxes and assessments which shall hereafter become due upon said property, or any part thereof, or may become in anywise due or owing in respect to the same, and will maintain, repair, and replace such property so that the same may at all times be and remain in

substantially as good plight and condition as that in which it now is, the nature and character of the property being considered."

That under and by virtue of said contract, and the clauses hereinabove set forth, therein contained, the Atlantic and Pacific
31 Railroad Company, on the first day of October, 1884, entered into the actual, sole, and exclusive possession of all that line of railroad from the town of Mojave, in the county of Kern, to the Colorado river, in the county of San Bernardino, in said State of California; that the said railroad so acquired from the Southern Pacific Railroad Company by the Atlantic and Pacific Railroad Company, under the provisions of said contract, was, and ever since has been, 242.50 miles in length; that no part of the contract of sale hereinabove referred to has been consummated other than the provisions concerning the lease of said railroad, and that no part of the purchase price has been paid to the Southern Pacific Railroad Company for and on account of said contract, and that the legal title to said railroad remains in the Southern Pacific Railroad Company.

That at the time of making and entering into said contract hereinabove referred to, and ever since said time, the Southern Pacific Railroad Company, as the plaintiff is informed and believes, owned and operated in the State of California, under its name, about 1,000 miles of railroad in said State, including the line covered by said contract as aforesaid, which said lines of railroad ran into and through more than one county in said State of California; that during the years 1888, 1889, 1890, 1891, 1892, and 1893, the Southern Pacific Railroad Company returned to the State board of equalization of the State of California a statement of the property owned by said company in said State, including its franchise, roadway, road-bed, rails, and rolling stock, for the purpose of having the State board of equalization assess the same for
32 taxation for said years; that said returns for each of said years included in the mileage given the railroad so leased to the Atlantic and Pacific Railroad Company under the terms of said contract of August 20, 1884, as aforesaid; that in the year 1893, and in due time, the State board of equalization of the State of California assessed the franchise, roadway, road-bed, rails, and rolling stock of the Southern Pacific Railroad Company in the State of California, including the line of railroad from Mojave to the Needles so leased to the Atlantic and Pacific Railroad Company as aforesaid, and that that assessment included the value of all rolling stock, cars, engines, and personal property of every description owned by the Southern Pacific Railroad Company which could be assessed in connection with the operation of its road in said State by the State board of equalization; and that said assessment included the 242.51 miles of road from Mojave to the Colorado river, covered by the contract of August 20th, 1884, as aforesaid. That notwithstanding said fact, the State board of equalization of the State of California did, in the year 1893, demand and require of the Atlantic and Pacific Railroad Company that it should make a return to it of all its personal property in the shape of rolling stock, etc., used in the operation of the line of road from the Colorado

river to Mojave, leased from the Southern Pacific under said contract, and that thereupon, and under protest, the Atlantic and Pacific Railroad Company returned to the said State board that it had in operation eighty-nine cars and locomotive engines of the value of $56,810, which it had in use and operation at times along
33 the line of said road so leased by said contract as aforesaid; that thereupon the said State board of equalization assessed said rolling stock at a total valuation of $125,000, or $515.44 a mile, notwithstanding the fact that the same board had assessed the line of railroad on which said rolling stock was used, to the Southern Pacific Railroad Company, together with its *pro rata* share of said railroad's personal property, including rolling stock, at the rate of $9,303.95 per mile. That the State board of equalization first assessed said line of road to the Southern Pacific Railroad Company as aforesaid, and included in said assessment the average value of the entire rolling stock of the Southern Pacific per mile, so that the total assessment of said line was $9,303.95 per mile for the year 1895, including its *pro rata* share of rolling stock aforesaid; and then said board assessed the Atlantic and Pacific Railroad Company upon the same mileage, the sum of $515.44 per mile for rolling stock only, and did not assess to it any mileage of any railroad whatever.

That the State board thereupon levied upon said assessment against the Atlantic and Pacific Railroad Company a total tax of $2,272.80, and that it also levied against the Southern Pacific Railroad Company for the same line of railroad a total tax of $33,981.58, which was duly paid to the State of California; that during the year 1893 the cars and locomotive engines assessed to the Atlantic and Pacific Railroad Company upon said line of railroad, and so returned by it to the State board of equalization, were through cars running over said line of railroad from the east and from the west, in and
34 out of the State of California; the trains containing the cars originating in Chicago, in the State of Illinois, and in Albuquerque, in the Territory of New Mexico, and in San Diego, Los Angeles, and San Francisco, in the State of California. That during all of said time the Atlantic and Pacific Railroad Company, through contract, formed a part of a through transcontinental system between Chicago, Illinois, in the east, and Los Angeles, San Diego, and San Francisco, in the State of California; and that the cars operated over said line of railroad in California were through cars, running on through trains, and none of said cars were locally kept all the time upon said line of railroad in the State of California, and none were kept stationary in the State of California, or in said State at all, except when in operation and running over that portion of the track of the Atlantic and Pacific Railroad Company located therein, and except when at stations for the purpose of loading and unloading. That during the year 1893 the Atlantic and Pacific Railroad Company returned all of its rolling stock owned by it and subject to taxation, including that as assessed as aforesaid, for assessment and taxation, to the proper authorities in the county of Bernalillo and Territory of New Mexico, that being the headquar-

ters of said railroad company, where its eastern terminus was and is, and the situs of all of its property outside of its track, right of way, and stations. That on the 27th day of March, 1894, the then plaintiffs, for the Atlantic and Pacific Railroad Company, and as receivers of it, paid the second half of installment of the taxes for the year 1893, so levied by the said State board of equaliza-
35 tion as aforesaid, to the treasurer of the State of California; and prior to the commencement of this action all of said taxes so levied as aforesaid, amounting to the aforesaid sum of $2,272.80, were duly paid to said State treasurer. That prior to the commencement of this action, and prior to the first day of June, 1894, the then plaintiffs, as such receivers, gave notice in writing to the comptroller of the State of California that they intended to bring an action against the treasurer of the State of California to recover the taxes so levied and assessed as aforesaid, and paid by the Atlantic and Pacific Railroad Company to said State treasurer, which said notice in all respects conformed with the requirements of the statute; a true and correct copy of the same is hereto attached, marked Exhibit "A," and made a part hereof; that the making of said assessment, and the levy of said taxes on the rolling stock of the Atlantic and Pacific Railroad Company, by said State board of equalization for the year 1893 was unauthorized by law, illegal, and void; that by assessing the railroad so leased by the Atlantic and Pacific Railroad Company to the Southern Pacific Railroad Company, its owner, the State board of equalization had no jurisdiction whatever to assess rolling stock belonging to the Atlantic and Pacific Railroad Company, and used, temporarily only, in the State of California, in the operation by the Atlantic and Pacific Railroad Company of through trains over and upon said leased line; that all of the rolling stock owned by the Atlantic and Pacific Railroad Company in the year 1893, or in its possession and under its control, was rolling stock used in transporting
36 freight and passengers on trains running from points in the State of California to points in other States and Territories east of it, and from points in other States and Territories east of the State of California to points in it; and that during said time no train was operated by the Atlantic and Pacific Railroad Company wholly within the State of California; that the home and situs of all of said rolling stock owned or controlled by the Atlantic & Pacific Railroad Company was at Albuquerque, in the Territory of New Mexico, during the year 1893.

That at the time of the commencement of this action J. McDonald was the duly elected, qualified, and acting treasurer of the State of California, but that since the commencement of this action and during its pendency the term of office of the said J. R. McDonald has expired, and that Levi Rackliffe is now the duly elected, qualified, and acting treasurer of the State of California, and successor in office to the said J. R. McDonald.

Wherefore, plaintiff demands judgment against said defendant, as the treasurer of the State of California, for the sum of $2,272.80, with interest thereon from the date of the payment of said sum, or

any portion thereof, to the State treasurer, together with the costs of this action.

C. N. STERRY,
Attorney for Plaintiff.

E. S. PILLSBURY, *Of Counsel.*

37 EXHIBIT "A."

ALBUQUERQUE, N. M., *March* 28, 1894.

To the comptroller of the State of California, Sacramento, California:

You will please take notice that J. W. Reinhart, John J. McCook, and Joseph C. Wilson, the receivers who have been duly appointed as receivers of the Atlantic and Pacific Railroad Company of all its rights and property, and who since such appointment have duly qualified and entered upon the discharge of the duties of their office, and taken possession of said railroad, of all its property and rights in action, intend to bring an action against the State treasurer of the State of California to recover from said State treasurer the sum of twenty-two hundred and seventy-two dollars and $\frac{80}{100}$ ($2,272.80), the amount of tax paid by the Atlantic and Pacific Railroad Company, and by the receivers for it, to the State treasurer, as and for taxes assessed against the Atlantic and Pacific Railroad Company in the State of California for the year 1893, by the State board of equalization of said State.

Respectfully,

J. W. REINHART,
JOHN J. McCOOK, AND
JOSEPH C. WILSON,
By C. N. STERRY,
Their Attorney.

38 I hereby acknowledge that the original of the above and foregoing notice was delivered to me at Sacramento, California, on the 2d day of April, 1894, and filed on said date.

E. P. COLGAN,
State Comptroller.

(Endorsed:) Filed Oct. 16th, 1896. W. J. Costigan, clerk.

Service of the within amended complaint admitted this 15th day of October, 1896.

W. E. FITZGERALD,
Attorney for Defendant.

39 In the Circuit Court of the United States for the Northern District of California, Ninth Circuit.

C. W. SMITH, Successor to J. W. Reinhart, John J. McCook, and Joseph C. Wilson, as Receiver- of the Atlantic and Pacific Railroad Company, and Receiver of the Atlantic and Pacific Railroad Company, Plaintiff,

vs.

LEVI RACKLIFFE, as Successor in Office to J. R. McDonald as Treasurer of the State of California, Defendant.

Demurrer to Amended Complaint.

Now comes the defendant, and demurring to the amended complaint of the plaintiff herein, for ground of demurrer says:

I.

That the court has no jurisdiction of the subject of the action.

40 II.

That the amended complaint does not state facts sufficient to constitute a cause of action.

Wherefore defendant prays to be hence dismissed with his costs.

W. F. FITZGERALD,
Attorney General, Attorney for Defendant.

I hereby certify that the foregoing demurrer is, in my opinion, well founded in point of law.

W. F. FITZGERALD,
Attorney General, Attorney for Defendant.

STATE OF CALIFORNIA, *County of Sacramento,* } *ss:*

Levi Rackliffe, as treasurer of State, being first duly sworn, deposes and says that he is the defendant in the above-entitled action, and that the foregoing demurrer is not interposed for delay.

LEVI RACKLIFFE.

Subscribed and sworn to before me this 6th day of November, 1896.

A. BETZ,
Phonographic Reporter for the Attorney General.

(Endorsed:) Filed November 6, 1896. W. J. Costigan, clerk, by W. B. Beaizley, deputy clerk.

41 Service of copy of the within demurrer admitted this 6th day of Nov., 1896.

C. N. STERRY,
E. S. PILLSBURY,
Attorneys for Pl'ffs.

At a stated term, to wit, the November term, A. D. 1897, of the circuit court of the United States of America, of the ninth judicial circuit, in and for the northern district of California, held at the court-room in the city and county of San Francisco, on Friday, the 17th day of December, in the year of our Lord one thousand eight hundred and ninety-seven.

Present: The Honorable William W. Morrow, circuit judge.

C. W. SMITH, Receiver, etc.,
vs.
LEVI RACKLIFFE, Treasurer, etc. } No. 11915.

Order Sustaining Demurrer.

Defendant's demurrer to the amended complaint of plaintiff, heretofore heard, and submitted to the court, having been fully considered, and the opinion of the court having been filed, it
42 is, in accordance with said opinion, ordered that said demurrer be, and the same hereby is, sustained.

On motion of F. D. Madison, Esq., attorney for plaintiff, it is ordered that plaintiff be, and hereby is, allowed ten days within which is to amend his complaint herein, if so advised.

In the Circuit Court of the United States in and for the Ninth Judicial Circuit, Northern District of California.

C. W. SMITH, as Receiver, etc., Plaintiff,
vs.
LEVI RACKLIFFE, as Treasurer, etc., Defendant.

Judgment of Dismissal.

In this action, the demurrer of the defendant heretofore interposed herein to plaintiff's amended complaint having been duly sustained by this court, and an order having been duly made and entered to that effect on the 17th day of December, 1897, and the plaintiff by his attorney on that day, in open court, having requested this court to allow him ten days within which to file an amended complaint, if he should consider that said complaint could
43 be amended so as to meet the order of the court in sustaining said demurrer, and said ten days having expired, and no amended complaint having been filed, and the defendant having requested that the default of plaintiff be entered, and that judgment be entered herein, dismissing said action and awarding defendant judgment against plaintiff for his costs of suit:

Wherefore, by reason of the law and the premises aforesaid, it is ordered that the default of plaintiff be entered, and it is ordered, adjudged, and decreed that said action be, and the same is hereby, dismissed, and that Levi Rackliffe, as treasurer of the State of California, the defendant herein, do have and recover of and from C. W. Smith, as successor to J. W. Reinhart, John J. McCook, and Joseph C. Wilson, as receivers of the Atlantic and Pacific Railroad Com-

pany, and receiver of the Atlantic and Pacific Railroad Company, the plaintiff herein, his costs and disbursements in said action.

Dated December 30th, 1897.

HAWLEY, *Judge.*

(Endorsed:) Filed December 30, 1897. Southard Hoffman, clerk.

44 In the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Northern District of California.

C. W. SMITH, etc., *vs.* LEVI RACKLIFFE, etc. } No. 11915.

Certificate to Judgment-roll.

I, Southard Hoffman, clerk of the circuit court of the United States, for the ninth judicial circuit, northern district of California, do hereby certify that the foregoing papers hereto annexed constitute the judgment-roll in the above-entitled action.

Attest my hand and the seal of said circuit court, this 30th day of December, 1897.

[SEAL.] SOUTHARD HOFFMAN, *Clerk.*

(Endorsed:) Judgment-roll. Filed December 30, 1897. Southard Hoffman, clerk.

45 In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

Hon. Joseph McKenna, circuit judge.

J. W. REINHART ET AL., Plaintiffs, *vs.* J. R. MCDONALD, Treasurer of the State of California, Defendant. } No. 11915.

MONDAY, *August* 17, 1896.

Opinion on Demurrer to Complaint and Motion to Dismiss.

Appearances.

C. N. Sterry, Esq., and E. S. Pillsbury, Esq., appeared for the plaintiffs.

W. F. Fitzgerald, Esq., attorney general of California, and W. H. Anderson, Esq., assistant attorney general of California, appeared for the defendant.

MCKENNA, *Circuit Judge:*

The allegations of the complaint in this action are: That the Atlantic and Pacific Railroad Company, of which the plaintiffs are

the receivers, is the lessee of a certain line of railroad situ-
46 ated in the State of California, known as the Southern Pacific Railroad Company; that in the operation of such railroad it was equiped with eighty-nine cars and locomotive engines, of the value of $56,810, which rolling stock it had in use and operation at all times along the line of its road; that all of said rolling stock has been assessed, and the tax thereon collected in the Territory of New Mexico; that the said rolling stock was used in interstate commerce carried on between the States of Illinois and California, that the railroad, leased from the Southern Pacific Railroad Company as aforesaid, was assessed by the State board of eq-alization to said Southern Pacific Railroad Company, and the assessment of said railroad, including the *pro rata* share of the entire rolling stock of the Southern Pacific in California, being levied thereon, was paid.

The action is brought against the treasurer of the State of California, in accordance with section 3669 of the Political Code, which enables suit to be brought against the treasurer of the State for taxes claimed to be illegal.

The defendant demurs to the complaint on the ground of want of jurisdiction of the court to maintain the action, and, also, on the ground that the complaint does not state a cause of action.

The principal point made on the first ground of the demurrer is that the suit is essentially one against the State of California, and that such suit cannot be maintained against the State without
47 its consent; and that the consent given in section 3669 of the Political Code is of suit brought only in the State courts.

The view that this is a suit against the State is presented by the attorney general with great strength and plausibility. But, even if the contention be true, I think it is a fair deduction from the authorities as from the principle that the right of suit against the treasurer of the State being given, it may be brought in the Federal courts when other grounds of jurisdiction exist, as they do in this case. I do not think it is necessary to review the cases; they are very numerous, and the care of counsel has cited all of them.

The claim of exemption from taxation of the property described in the complaint is based on the following grounds:

First. That the property is engaged in interstate commerce.

Second. That its situs is in New Mexico, where taxes on it have been paid.

Third. That the Atlantic and Pacific Railroad Company is not the owner of the railroad, and, under the constitution of the State of California, the rolling stock can only be assessed to the owner of the railroad.

The first two grounds are answered by the cases of Marye *v.* Baltimore and Ohio Railroad Company, 127 U. S., 117, and Pullman's Car Company *v.* Pennsylvania.

The constitution of the State of California is as follows:

48 SECTION 1, Article XIII. "All property of the State not exempt under the laws of the United States shall be taxed in proportion to its value, to be ascertained as provided by law. The word 'property,' as used in this article and section, is hereby de-

clared to include moneys, credits, bonds, stocks, dues, franchises, and all other matters and things, real, personal, and mixed, capable of private ownership."

SECTION 10, Article XIII. "* * * The franchise, roadway, road-bed, rails, and rolling stock of all railroads operated in more than one county in this State shall be assessed by the State board of equalization, at their actual value, and the same shall be apportioned to the counties, cities and counties, cities, towns, townships, and districts in which such railroads are located, in proportion to the number of miles of railway laid in such counties, cities and counties, cities, towns, townships, and districts."

These provisions seem to need no interpretation. The first section is so comprehensive that it can only be defined in terms of itself; and it certainly embraces—as it exactly and carefully says it embraces—all matters and things "capable of private ownership."

Section 10 provides a means for the assessment of certain kinds of those things, and it was said by the supreme court of California in People *v.* Sacramento Co., 59 Cal., 325, to be self-executing. But it is urged by the plaintiff that there must be an union of them in the same ownership as a condition of assessment. This view is supported by an ingenious and puzzling argument aided (or
49 apparently aided) by some remarks of Justice Harrison in People *v.* Central Pacific Railroad Company, 105 Cal., 587.

The learned justice said: "The franchise is a unit, and can be transferred only as a unit, and the rolling stock has no particular situs in any county, but, in connection with the roadway and road-bed, are essential for the enjoyment of the franchise, while the whole—the franchise, roadway, road-bed, rails, and rolling stock—constitute an entirety incapable of division."

The question and circumstances of that case were different from those of the case at bar. In that case the question before the court was the constitutionality of certain provisions of the political code of the State, making a class of railroads operated in more than one county. To sustain this classification it was necessary for the court to find, and the court did find, a difference in the condition of property which had situs (if I may so speak) in many counties—as the franchise or situs in no particular county—as rolling stock.

The constitution clearly made a class of certain species of property, and, besides, it was equally clear that if delinquent taxes were attempted to be collected on such property as on other property, embarrassments would necessarily arise. How, indeed, in the ordinary way, could the taxes be realized? How a sale or transfer be made in any particular county for its share of taxes apportioned under the constitution? It was truly said: "Even if the roadway within the county could be described, there could be no ap-
50 portionment to the several counties of the franchise, or of the rolling stock, which could serve as a description or be capable of transfer." Their value, or the value of either, could be apportioned and the taxes recovered by the action directed by section 3670 of the Political Code to be brought by the controller in the

name of the people of the State to collect the taxes upon property assessed by the State board of equalization. It was to illustrate this embarrassment, not to express a principle (neither necessary to his reasoning or to the points involved), which might exempt some of the property of the State from taxation that Justice Harrison used the language he did.

It is further urged against the legality of the taxes that the provisions of the constitution apply only to California railroads, and for this the case of Marye *v.* Baltimore and Ohio Railroad Company, *supra*, is relied on. The case was based on a bill in equity filed by the Baltimore and Ohio Railroad Company against the taxing officer of the State of Virginia, for the purpose of enjoining him from selling certain engines and cars, the property of the complainant, for the payment of a tax alleged to have been illegally assessed thereon. There was a decree in the circuit court granting the relief prayed for, from which the appeal was prosecuted.

The Baltimore and Ohio Railroad Company was a corporation organized under the laws of Maryland, and a citizen thereof, by virtue of whose charter its rolling stock was exempt from taxation. The line of its road did not at any point lie in the State of Virginia. It, however, connected with certain roads belonging
51 to corporations incorporated by various acts of the legislature of Virginia.

In the statement of the case the court said:

"The act of the General Assembly of the State of Virginia, under which the assessment and collection of these taxes were sought to be justified, is contained in section 20, c. 119, of the Acts of the Virginia Legislature, session of 1881–1882, being part of the taxing laws of the State originally enacted in 1870 and 1871, and continued with amendments to the present time. The material part of the act applicable to this case was as follows:

'19. Every railroad and canal company not exempted from taxation by virtue of its charter shall report annually on the first day of June, to the auditor of public accounts, all of its real and personal property of every description, as of the first day of February of each year, showing particularly in what county or corporation such property is located, and classifying the same under the following heads:

'First. Roadway and track, or canal bed.

'Second. Depots, depot grounds and lots, station buildings and fixtures, and machine shops.

'Third. Real estate not included in other classes.

'Fourth. Rolling stock, including passenger, freight, cattle or stock, baggage, mail, express, sleeping, palace, and all other cars owned by or belonging to the company, boats, machinery, and equipments, houses and appurtenances occupied by lock-gate keepers and other employees.

52 'Fifth. Stores.

'Sixth. Telegraph lines.

'Seventh. Miscellaneous property.

'Every such company shall report on or before the first day of

June of each year the gross and net receipts of the road or canal for the twelve months preceding the first day of February of each year, and in all cases the report shall be so made as to give the data on which the same is made. If such road or canal is only in part within the Commonwealth, the report shall show what part is within the Commonwealth and what proportion the same bears to the entire length of the road or canal, and shall apportion the receipts accordingly. The reports herein required shall be verified by the oath of the president or other proper officer. Upon the receipt of every such report it shall be the duty of the auditor of public accounts to lay the same before the board of public works, who shall, after thirty days' notice previously given to the president, treasurer, or other proper officer, proceed to ascertain and assess the value of the property so reported, upon the best and most reliable information that can be procured; and to this end shall be authorized and empowered to send for persons and papers should it be deemed necessary. A certified copy of the assessment, when made, shall be immediately forwarded by the secretary of the board to the president or other proper officer of every railroad or canal company so assessed, whose duty it shall be to pay into the treasury of the State, within sixty days after the receipt thereof, the tax which may
53 be imposed thereon by law. A company failing to make such report, or to pay the tax assessed upon its property, shall be immediately assessed, under the direction of the auditor of the public accounts, by any person appointed by him for the purpose, rating their real estate and rolling stock at twenty thousand dollars per mile; and a tax shall at once be levied on such value at the annual rate levied upon the value of the other property for the year. Such tax so levied, as well as the sum required to be paid upon the report hereinbefore mentioned, if the same be not paid at the time provided herein, shall be collected by the treasurer of some county in which such company owns property to whom the auditor may deliver the assessment or a copy thereof. The treasurer may distrain and sell any personal property of such company, and shall pay the taxes into the treasury within three months from the time of the assessment, or a copy as aforesaid may be delivered to him. The compensation of such treasurer to be the same as he receives for collecting other taxes in his county or corporation.'"

The case has a very strong resemblance to the one at bar, but it depended upon the interpretation of the Virginia statute which is differently expressed, and has specializing provisions which are not found in the California constitution. It was upon these special provisions the opinion was based.

Justice Mathews, speaking for the court, said:

"The terms of the act, indeed, include 'every railroad and canal company not exempted from taxation by virtue of its charter,' but that language, according to a general rule of interpretation,
54 must be confined to corporations deriving their authority from the laws of Virginia. It is apparent, also, from the other expressions contained in the law, as well as its whole purview, that it was intended to apply only to such domestic corporations as, in the

case of railroad companies, were the owners of railroads and the property usually appurtenant thereto, lying and being within the State."

The language of the California constitution is, "All property of the State, not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law." * * *

The California constitution, therefore, applies to property without regard to its kind or ownership. It is only necessary that it should be "of the State." The limitations of the Virginia statute are not contained in the California constitution.

The demurrer is sustained, with leave to plaintiffs to amend within twenty days, if they shall be so advised; and the motion to dismiss is denied.

(Endorsed:) Filed August 17th, 1896. W. J. Costigan, clerk, by W. B. Beaizley, deputy clerk.

55 In the Circuit Court of the United States, Ninth Circuit, in and for the Northern District of California. At Law.

C. W. SMITH, Successor to J. W. Reinhart, John J. McCook, and Joseph C. Wilson as Receivers of the Atlantic and Pacific Railroad Co., and Receivers of the Atlantic and Pacific Railroad Company, Plaintiff,
vs.
LEVI RACKLIFFE, as Successor in Office to J. R. McDonald as Treasurer of the State of California, Defendant.
No. 11915.

C. N. Sterry, Esq., attorney for plaintiff; E. S. Pillsbury, Esq., of counsel.

W. F. Fitzgerald, Esq., attorney general of the State of California.

Opinion on Demurrer to Amended Complaint.

MORROW, *Circuit Judge:*

56 This action was brought by the receiver of the Atlantic and Pacific Railroad Company, under the provisions of section 3669 of the Political Code of this State, to recover of the State treasurer certain moneys paid by that company into the State treasury for taxes upon rolling stock operated by it within this State. A demurrer to the original complaint having been sustained by Judge McKenna (Reinhart *v.* McDonald, 76 Fed. Rep., 403), the complainant has filed an amended complaint, containing a formal substitution of parties, and some changes in the verbiage of the complaint, but no substantial change in the material allegations of the original complaint.

It appears that the Atlantic and Pacific Railroad Company is a corporation organized and incorporated under the act of Congress, approved July 27, 1866 (14 Stats. at Large, 292). It had in opera-

tion, in 1893, a line of railroad from the city of Albuquerque, in the county of Bernalillo, in the Territory of New Mexico, through the Territory of Arizona to the Needles, in the county of San Bernardino, State of California, thence to Mojave, in the county of Kern, in the same State. The home and situs of the rolling stock of the road was located at Albuquerque, New Mexico. The line of this road in the State of California, from Mojave to the Needles, a distance of about 243 miles, was built and is owned by the Southern Pacific Railroad Company. In August, 1894, the Southern Pacific Railroad Company agreed to sell this road from Mojave to the Needles to the Atlantic and Pacific Railroad Company. The sale was to be consummated whenever the Southern Pacific Railroad Company was able to make clear title to the line of railway
57 discharged from certain liens. In the meantime, and until the consummation of the sale and payment of the purchase price, the Southern Pacific Railroad Company leased this line of railway to the Atlantic and Pacific Railroad Company for a period of thirty years at an annual rental. The lease provided that the Atlantic and Pacific Railroad Company should promptly pay and discharge all taxes and assessments which should thereafter become due upon said property or any part thereof, or might become in anywise due or owing in respect to the same.

In the year 1893 the State board of equalization of this State assessed the franchise, roadway, road-bed, rails, and rolling stock of the Southern Pacific Railroad Company in the State of California, including the line of railroad from Mojave to the Needles, so leased to the Atlantic and Pacific Railroad Company, and which was, at that time, being operated by the last-named company, and did also demand and require of the Atlantic and Pacific Railroad Company that it should make a return of all its personal property in the shape of rolling stock, etc., used in the operation of the line of road from Mojave to the Needles, leased from the Southern Pacific Railroad Company, and thereupon, and under protest, the Atlantic and Pacific Railroad Company returned to the board of equalization that it had in operation eighty-nine cars and locomotive engines of the value of $56,810, which it had in use and operated at times along the line of said road, and thereupon the board of equalization assessed said rolling stock at a total valuation of $125,000, and
58 imposed a tax of $2,272.80, which the railroad company paid to the State treasurer.

To recover this sum of $2,272.80, the present suit was brought against the State treasurer by the receiver of the railroad company.

The first demurrer, interposed by the attorney general of the State, raised the question of jurisdiction of the court, to entertain the action, because it was in effect a suit against the State of California. The demurrer also placed in issue the sufficiency of the complaint in stating a cause of action. The court held that it had jurisdiction of the action, but sustained the demurrer on the other ground. The sufficiency of the complaint involved the question whether, under section 3665 of the Political Code of California, the

State board of equalization had the power to assess the rolling stock of a railroad corporation, where the corporation is not located in the State and does not own the line of road upon which the rolling stock is used, but holds the road under a lease. The section provides, among other things, as follows:

"The board must assess the franchise, roadway, road-bed, rails, and rolling stock of all railroads operated in more than one county. * * * Assessment must be made to the corporation, person, or association of persons owning the same. The depots, stations, shops, and buildings erected upon the space covered by the right of way, and all other property owned by such person, corporation, or association of persons, are assessed by the assessor of the county where they are situate."

It was contended that, as the Atlantic and Pacific Railroad
59 Company was not the owner of the line of railroad from Mojave to the Needles the rolling stock on that road could not be assessed to that corporation. In other words, there must be a union in the ownership of the line of road and the rolling stock as a condition of assessment. The court held that the tax was legal under the constitution of the State, which provides, in section 1, article 13, that "all property of the State, not exempt under the laws of the United States, shall be taxed in proportion to its value to be ascertained as provided by law."

In support of the present demurrer, it is contended that the State board of equalization had no jurisdiction under the constitution of the State, to assess rolling stock belonging to a railroad which is not operated in more than one county of the State; that, if such rolling stock happens to be in the State under such circumstances as to require that it should be taxed under the constitution and the laws of the State, the taxes required to be paid by it must be levied upon an assessment made by the local assessor and not by the State board of equalization. It is contended, further, that this proposition was not presented by counsel, or considered by the court upon the first demurrer. The sufficiency of the complaint certainly involved this question, and, in my opinion, it was presented by counsel in their briefs.

But assuming that the question was not considered or determined by the court, I am of the opinion that the assessment is in accordance with the constitution and law of the State. Section 10 of article 13 of the constitution of the State provides: "All
60 property, except as hereinafter in this section provided, shall be assessed in the county, city, city and county, town, township, or district in which it is situated, in the manner prescribed by law. The franchise, roadway, road-bed, rails, and rolling stock of all railroads operated in more than one county in this State shall be assessed by the State board of equalization, at their actual value, and the same shall be apportioned to the counties, cities and counties, cities, towns, townships, and districts in which such railroads are located, in proportion to the number of miles of railway laid in such counties, cities and counties, cities, towns, townships, and districts."

Section 3665 of the Political Code as we have seen, requires the board of equalization to assess rolling stock of railroads operated in more than one county, and the assessment must be made to the corporation, person, or association of persons owning the same.

This is an assessment against a railroad corporation on rolling stock operated by such corporation over a line of railroad in more than one county in the State, and, in my opinion, comes within the jurisdiction conferred upon the board of equalization by the constitution. The demurrer will be sustained.

(Endorsed:) Opinion of demurrer to amended complaint. Filed Dec. 17, 1897. Southard Hoffman, clerk, by W. B. Beaizley, deputy clerk.

61 In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

C. W. SMITH, as Successor to J. W. Reinhart, John J. McCook, and Joseph C. Wilson as Receivers of the Atlantic and Pacific Railroad Company, and Receiver of the Atlantic and Pacific Railroad Company, Plaintiff,

vs.

LEVI RACKLIFFE, as Treasurer of the State of California, Defendant.

Petition for Writ of Error.

To the honorable justices of the United States circuit court of appeals, ninth circuit:

Now comes C. W. Smith, as receiver of the Atlantic and Pacific Railroad Company, a corporation duly created and incorporated under the act of Congress approved July 27, 1866, by C. N. Sterry, his attorney, and complains that in the record and proceedings, and also in the rendition of judgment in a suit wherein C. W. Smith, as such receiver, and as successor of J. W. Reinhart, John J.
62 McCook, and Joseph C. Wilson, as receivers of the Atlantic and Pacific Railroad Company, is plaintiff, and Levi Rackliffe, as treasurer of the State of California, is defendant, tried in the circuit court of the United States for the northern district of California, and in which a judgment was rendered against the plaintiff, as such receiver, on the 30th day of December, 1897, dismissing said action and entering and rendering a judgment for costs therein against the said C. W. Smith, as such receiver as plaintiff, manifest error hath intervened, to the great damage of the said C. W. Smith as such receiver:

Wherefore, the said C. W. Smith, as such receiver, prays for the allowance of a writ of error, and such other process as may cause the errors committed in the rendition of said judgment to be corrected by the United States circuit court of appeals for the ninth circuit.

C. N. STERRY,

Attorney for Plaintiff, C. W. Smith, as Receiver of the Atlantic and Pacific Railroad Company.

Order Allowing Writ of Error.

A writ of error is allowed as herein prayed for.
Dated December 30, 1897.

HAWLEY, *Judge.*

(Endorsed:) Filed Dec. 30, 1897. Southard Hoffman, clerk, by W. B. Beaizley, deputy clerk.

63 In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

C. W. SMITH, as Successor to J. W. Reinhart, John J. McCook, and Joseph C. Wilson as Receivers of the Atlantic and Pacific Railroad Company, and Receiver of the Atlantic and Pacific Railroad Company, Plaintiff,

vs.

LEVI RACKLIFFE, as Treasurer of the State of California, Defendant.

Assignment of Errors.

Comes now C. W. Smith, successor to J. W. Reinhart, John J. McCook, and Joseph C. Wilson, receivers of the Atlantic and Pacific Railroad Company, and receiver of the Atlantic and Pacific Railroad Company, and complains of the defendant, Levi Rackliffe, as treasurer of the State of California, for that the said defendant, on the 30th day of December, 1897, in the United States circuit court for the ninth circuit, northern district of California, recovered a judgment by the consideration of said court against this
64 plaintiff dismissing an action therein pending, wherein this plaintiff was plaintiff and the said Levi Rackliffe, as such treasurer, was defendant; a copy of the record of said judgment and the proceedings in said cause, duly certified, is attached hereto, marked Exhibit "A," and made a part hereof; and the said plaintiff avers that there is error in said record and proceedings, to wit:

1st. That the court erred in sustaining the demurrer to the amended complaint of the plaintiff filed herein, as will fully appear from an inspection of said record.

2d. That said court erred in rendering a judgment in favor of the defendant and against the plaintiff, upon the sustaining of said demurrer, as will fully appear by reference to said record.

Wherefore, the plaintiff, C. W. Smith, successor to J. W. Reinhart, John J. McCook, and Joseph C. Wilson, as receivers of the Atlantic and Pacific Railroad Company, as such receiver, prays that a writ of error be issued, in order that the error above stated and set forth, if any hath been, will be duly corrected and full and speedy justice done the parties aforesaid in this behalf and that the

plaintiff be restored to all rights lost by the erroneous rulings of the court herein complained of.

C. N. STERRY,
Attorney for Plaintiff, C. W. Smith, as Receiver of the Atlantic and Pacific Railroad Company.

(Endorsed:) Filed Dec. 30, 1897. Southard Hoffman, clerk, by W. B. Beaizley, deputy clerk.

65 In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

C. W. SMITH, as Successor to J. W. Reinhart, John J. McCook, and Joseph C. Wilson as Receivers of the Atlantic and Pacific Railroad Company, as Receiver of the Atlantic and Pacific Railroad Company, Plaintiff,
vs.
LEVI RACKLIFFE, as Treasurer of the State of California, Defendant.

Bond on Writ of Error.

Know all men by these presents, that we, the Santa Fe Pacific Railroad Company, a corporation, incorporated under the act of Congress approved March 3d, 1897, as principal, and F. B. Henderson and J. B. Alexander, are held and firmly bound unto the defendant, Levi Rackliffe, as treasurer of the State of California, his successor in office and assigns, in the sum of five hundred
66 dollars ($500.00), for the payment of which in lawful money of the United States of America, well and truly to be made, we bind ourselves, our heirs, executors, and assigns firmly by these presents.

The conditions of the above obligation are such, that whereas, on the 30th day of December, 1897, a judgment dismissing said above-entitled action and adjudging that the plaintiff, C. W. Smith, as such receiver, pay to the defendant, as the costs taxed for and on behalf of the defendant, the sum of — was duly made and entered.

And whereas, that plaintiff desires to appeal from said judgment dismissing said cause and taxing said cost to him, to the United States circuit court of appeals for the ninth judicial district, and has commenced proceedings in error for the purpose of appealing from said judgment:

Now, therefore, if the plaintiff shall duly prosecute said appeal with diligence and without delay, and shall pay all damages and costs if he fail to make his plea good in said proceedings in error, then and in such case this obligation shall be null and void; otherwise to remain in full force and effect.

SANTA FE PACIFIC RAILROAD COMPANY,
By G. F. H. OTTERHOFF, JR.,
Its Treasurer.
F. B. HENDERSON.
J. B. ALEXANDER.

67 STATE OF CALIFORNIA, } ss:
County of Los Angeles, }

F. B. Henderson and J. B. Alexander, each being severally sworn, for himself says:

That he is a citizen and resident of Los Angeles, State of California; and that he is worth the sum of five hundred dollars ($500.00) over and above all liabilities and exemptions, and that he is a freeholder in said city, county and State.

F. B. HENDERSON.
J. B. ALEXANDER.

Subscribed and sworn to before me this 31st day of December, A. D. 1897.

[SEAL.] J. L. B. HAMILTON,
Notary Public in and for the County of Los Angeles, State of California.

The within bond is hereby approved.
Dated January 3, 1898.

WM. W. MORROW, *Judge.*

(Endorsed:) Filed Jan. 3, 1898. Southard Hoffman, clerk, by W. B. Beaizley, deputy clerk.

68 In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

C. W. SMITH, as Successor to J. W. Reinhart, John J. McCook, and Joseph C. Wilson as Receivers of the Atlantic and Pacific Railroad Company, and Receiver of the Atlantic and Pacific Railroad Company, Plaintiff,
vs.
LEVI RACKLIFFE, as Treasurer of the State of California, Defendant. } No. 11915.

Clerk's Certificate to Transcript.

I, Southard Hoffman, clerk of the circuit court of the United States of America, of the ninth judicial circuit, in and for the northern district of California, do hereby certify the foregoing sixty-one (61) written pages, numbered from 1 to 61, inclusive, to be a full, true, and correct copy of the record and proceedings in the above and therein entitled cause, as the same remains of record and on file in the office of the clerk of said court, and that the same constitute the return to the annexed writ of error.

I further certify that the cost of the foregoing return to writ of error is $45.60, and that said amount was paid by C. N. Sterry, Esq., attorney for plaintiff.

69 In testimony whereof, I have hereunto set my hand and affixed the seal of said circuit court this 6th day of January, A. D. 1898.

[SEAL.] SOUTHARD HOFFMAN,
Clerk U. S. Circuit Court, Ninth Judicial Circuit, Northern District of California.

In the United States Circuit Court of Appeals for the Ninth Circuit.

C. W. SMITH, as Successor to J. W. Reinhart, John J. McCook, and Joseph C. Wilson as Receivers of the Atlantic and Pacific Rail road Company, and Receiver of the Atlantic and Pacific Railroad Company, Plaintiff, *vs.* LEVI RACKLIFFE, as Treasurer of the State of California, Defendant.	In Error to the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Northern District of California.

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the northern district of California, Greeting:

70 Because in the record and proceedings, and also in the rendition of the judgment in an action which is in said circuit court before you, between C. W. Smith, as successor to J. W. Reinhart, John J. McCook, and Joseph C. Wilson, as receivers of the Atlantic and Pacific Railroad Company, and as receiver of the Atlantic and Pacific Railroad Company, plaintiff, and Levi Rackliffe, as treasurer of the State of California, a manifest error hath happened, to the great damage of the said C. W. Smith, as such receiver, as by his complaint appears; and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly made, to send the record and proceedings aforesaid, with all the information concerning the same, to the United States circuit court of appeals for the ninth circuit, together with this writ, so that you have the same at the office of the clerk of said circuit court of appeals on the 12th day of January, 1898, in said circuit court of appeals to be then and there held; that the record and proceedings aforesaid being inspected, the said circuit court of appeals may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 30th day of December, in the year

of our Lord one thousand eight hundred and ninety-seven
71 and of the Independence of the United States the one hundred and twenty-first.

[SEAL.] SOUTHARD HOFFMAN,
Clerk of the United States Circuit Court for the Northern District of California.

The above writ of error is hereby allowed.

THOMAS P. HAWLEY, *Judge.*

Receipt of a copy of the within writ of error admitted this 31st day of December, 1897.

W. F. FITZGERALD,
Attorney General of California, Attorney for Levi Rackliffe, as Treasurer, etc., Defendant.

(Endorsed:) Filed December 31, 1897. Southard Hoffman, clerk, by W. B. Beaizley, deputy clerk.

Return to Writ of Error.

The answer of the judges of the circuit court of the United States of the ninth judicial circuit in and for the northern district of California.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said court, to the United States circuit court of appeals for the ninth circuit within mentioned at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the court:

[SEAL.] SOUTHARD HOFFMAN, *Clerk.*

72 *Citation.*

UNITED STATES OF AMERICA, *ss:*

To Levi Rackliffe, as treasurer of the State of California, Greeting:

You are hereby cited and admonished to be and appear at a United States circuit court of appeals for the ninth circuit, to be held at the city of San Francisco, in the State of California, on the 12th day of January, 1898, pursuant to a writ of error on file in the clerk's office of the circuit court of the United States for the ninth judicial circuit in and for the northern district of California, wherein C. W. Smith, as successor to J. W. Reinhart, John J. McCook, and Joseph C. Wilson as receivers of the Atlantic and Pacific Railroad Co., and receiver of the Atlantic and Pacific Railroad Company, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment given, made, and rendered against the said C. W. Smith, as such receiver of the Atlantic and Pacific Railroad Company, in the said writ of error mentioned, should not

be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Thomas P. Hawley, United States district judge for the district of Nevada, holding United States circuit court for the northern district of California, this 30th day of December, in the year of our Lord one thousand eight hundred and
73 ninety-seven, and of the Independence of the United States the one hundred and twenty-first.

THOMAS P. HAWLEY, *Judge.*

Receipt of a copy of the within citation admitted this 31st day of December, 1897.

W. F. FITZGERALD,
Attorney General of California, Attorney for Levi Rackliffe, as Treasurer, etc., Defendant.

(Endorsed:) Filed December 31, 1897. Southard Hoffman, clerk, by W. B. Beaizley, deputy clerk.

(Endorsed:) No. 422. In the United States circuit court of appeals for the ninth circuit. C. W. Smith, as successor to J. W. Reinhart, John J. McCook, and Joseph C. Wilson, as receivers of the Atlantic and Pacific Railroad Company, and receiver of the Atlantic and Pacific Railroad Company, plaintiff in error, *v.* Levi Rackliffe, as treasurer of the State of California, defendant in error. Transcript of record. In error to the United States circuit court of the ninth judicial circuit, in and for the northern district of California. Filed Jan. 6, 1898. Frank D. Monckton, clerk, by Meredith Sawyer, deputy clerk.

74 In the United States Circuit Court of Appeals for the Ninth Circuit.

C. W. SMITH, as Successor to J. W. Reinhart, John J. McCook, and Joseph C. Wilson as Receivers of the Atlantic & Pacific R. R. Co., and Receiver of the Atlantic & Pacific R. R. Company, Plaintiffs in Error, *v.* LEVI RACKLIFFE, as Treasurer of the State of California, Defendant in Error.	No. 422. Filed May 3, 1898.

1. Jurisdiction of Federal courts—Action against State officer.—An action by a citizen of another State or by an alien against a State treasurer to recover taxes alleged to have been illegally collected by the State is, in effect, an action against the State, and cannot be maintained in a Federal court in view of the prohibition of the eleventh amendment.
2. Same.—Pol. Code Cal., sec. 3669, which provides for bringing suits against the State to recover taxes illegally collected, is not to be construed as a consent that such suits may be brought in the Federal courts, since it contains provisions

wholly inapplicable to the procedure of the Federal courts, among them being a provision that, at a certain stage of the case, the treasurer may cause it to be removed into the superior court for the county of Sacramento.

3. Same—Citizenship—Receivers of corporations.—It is only where the jurisdiction of the Federal courts depends upon diverse citizenship that the citizenship of a receiver of an incorporated party is material. If the jurisdiction is asserted on
75 any other ground, the receiver stands upon the same footing as the corporation itself.

4. Same.—The provision in the Constitution giving the Federal courts jurisdiction of controversies "between a State and citizens of another State, * * * and between a State, or the citizens thereof, and foreign States, citizens or subjects" (article 3, sec. 2), does not include an action against a State by a corporation created by act of Congress.

Appeal from the circuit court of the United States for the northern district of California.

C. N. Sterry and E. S. Pillsbury, for plaintiff in error.
W. F. Fitzgerald and W. H. Anderson, for defendant in error.

Before Gilbert and Ross, circuit judges, and Hawley, district judge.

GILBERT, *Circuit Judge:*

The plaintiff in error, as receiver for the Atlantic & Pacific Railroad Company, was the plaintiff in an action which was brought against the State treasurer of the State of California, under section 3669 of the Political Code of California, to recover $2,272.80 taxes paid by said company for the year 1893, alleging, in his complaint, that said railroad company was operating, under a lease from the Southern Pacific Railroad Company, a certain line of railroad in the State of California, over which leased line the lessor company also ran its trains; that said line of road, and the rolling stock thereon, owned and operated by the Southern Pacific Railroad Company, were returned by that company to the State board of equalization for assessment for the year 1893, and were assessed to said Southern Pacific Company at a certain apportioned valuation per mile for all of the road which is covered by the lease; that the rolling stock on said leased road, owned and operated by the Atlantic & Pacific Railroad Company, was returned under protest by that company to the State board of equalization, and was by said board assessed for the year 1893 to its said owner; that each of said companies paid the taxes levied upon its property; that the said rolling stock of the Atlantic & Pacific Railroad Company so assessed was not used alone upon the line of the leased road in California, but was used in said company's traffic in other States, and was
76 constantly coming and going into and out of said State; and that the Atlantic & Pacific Railroad Company's headquarters and the situs of its rolling stock is in the county of Bernalillo, N. M.,

in which county all of its rolling stock was returned for taxation in 1893; that said assessment on the rolling stock of both companies using said road resulted in double taxation. The action was begun in the name of J. W. Reinhart, the former receiver of said road, and against J. R. McDonald, then the State treasurer. To the said complaint a demurrer was interposed, upon the grounds—first, that the court had no jurisdiction of the subject-matter of the action; and, second, that the complaint failed to state facts sufficient to constitute a cause of action. The circuit court, McKenna, J., sustained the demurrer upon the second ground, but disposed of the question of the jurisdiction in the following language:

"The view that this is a suit against the State is presented by the attorney general with great strength and plausibility. But, even if the contention be true, I think it is a fair deduction from the authorities, as from principle, that, the right of suit against the treasurer of the State being given, it may be brought in the Federal courts when other grounds of jurisdiction exist, as they do in this case. I do not think it is necessary to review the cases. They are very numerous, and the care of counsel has cited all of them." Reinhart *v.* McDonald, 76 Fed., 403.

Upon writ of error from this court, the plaintiff in error contends that the circuit court erroneously sustained the demurrer, and the defendant in error again raises the objection which was presented in the lower court, that the court is without jurisdiction of the subject-matter of the action upon the ground that it is an action against the State of California, and subject to the inhibition of the eleventh amendment to the Constitution of the United States, which provides that "the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State." There can be no doubt that the action, although nominally against the State treasurer, is in fact an action against the State of California. From the time of the adoption of the eleventh amendment the Supreme Court
77 of the United States has held that it should be construed fairly and liberally, and in consonance with its manifest purpose, and has established the doctrine that when "the nominal defendants have no personal interest in the subject-matter of the suit, but defend only as representing the State, the State is the real party against whom the relief is sought, and this suit is substantially within the prohibition of the eleventh amendment. Hagood *v.* Southern, 117 U. S., 52; 6 Sup. Ct., 608; Louisiana *v.* Jumel, 107 U. S., 711; 2 Sup. Ct., 128; *In re* Ayers, 123 U. S., 443; 8 Sup. Ct., 164; Louisiana *v.* Steele, 134 U. S., 230; 10 Sup. Ct., 511. *In re* Ayers, 123 U. S., 443; 8 Sup. Ct., 164, Mr. Justice Matthews said of the purpose of the eleventh amendment:

"It was thought to be neither becoming nor convenient that the several States of the Union, invested with that large residuum of sovereignty which had not been delegated to the United States, should be summoned as defendants to answer the complaints of private persons, whether citizens of other States or aliens, or that

the course of their public policy and administration of their public affairs should be subject to, and controlled by, the mandates of judicial tribunals without their consent, and in favor of individual interests. To secure the manifest purposes of the constitutional exemption guaranteed by the eleventh amendment requires that it should be interpreted, not literally and too narrowly, but fairly, and with such breadth and largeness as to effectually accomplish the substance of its purpose. In this spirit, it must be held to cover, not only suits brought against a State by name, but those also against its officers, agents, and representatives, where the State, though not named as such, is, nevertheless, the only real party against which alone, in fact, the relief is asked, and against which the judgment or decree effectively operates."

The present case comes clearly within the line of cases to which these words apply. It is a case in which the State of California is alone interested as defendant. No personal relief is sought as against the State treasurer, no act of his is brought in question, and no official misconduct is charged against him. So far as he is concerned, the action is purely impersonal. It was originally begun against McDonald, his predecessor in office. It is the aim of
78 the action to recover from the State treasurer, in his official capacity only, money which has been paid to the State for taxes, and mingled with other funds of the State. The money which the treasurer receives as such is kept by him in the vaults of the State treasury. It is so required by subdivision 1 of section 452 of the Political Code. If a judgment were rendered for plaintiff in the action, the treasurer, upon the controller's warrant, would be required to repay the tax money out of taxes so illegally collected, and to pay the costs out of the general fund of the treasury. The money sued for was not originally paid to the treasurer. It did not pass through his hands, but came into the treasury through other officers. The State is the only party in interest.

But, notwithstanding the eleventh amendment, the State may, by an act of its legislature, permit itself to be sued, either in a Federal court or in its own courts. It is contended by the plaintiff in error that such permission has been granted in the present case by the provisions of section 3669 of the Political Code of California, which reads as follows:

"SEC. 3669. Each corporation, person, or association assessed by the State board of equalization, must pay to the State treasurer upon the order of the controller, as other moneys are required to be paid into the treasury, the State and county, and city and county, taxes each year levied upon the property so assessed to it or him by said board. Any corporation, person, or association, dissatisfied with the assessment made by the board, upon the payment of the taxes due upon the assessment complained of, and the five per cent. added, if to be added, on or before the first Monday in February, and the filing of notice with the controller of an intention to begin an action, may, not later than the first Monday of February, bring an action against the State treasurer for the recovery of the amount of taxes and percentage so paid to the treasurer, or any part thereof, and in

the complaint may allege any fact tending to show the illegality of the tax, or the assessment upon which the taxes are levied, in whole or in part. A copy of the complaint and of the summons must be served upon the treasurer within ten days after the complaint has been filed, and the treasurer has thirty days in which to demur or answer. At the time the treasurer demurs or answers he may demand that the action be tried in the superior court of the county of Sacramento. The attorney general must defend the action. The provisions of the Code of Civil Procedure relating to pleading, proofs, trials, and appeals are applicable to the proceedings herein provided for. If the final judgment be against the treasurer, upon presentation of a certified copy of such judgment to the controller, he shall draw his warrant upon the State treasurer, who must pay to the plaintiff the amount of the taxes so declared to have been illegally collected, and the cost of such action, audited by the board of examiners, must be paid out of any money in the general fund of the treasury, which is hereby appropriated, and the controller may demand and receive from the county, or city and county, interested, the proportion of such costs, or may deduct such proportion from any money then or to become due to said county, or city and county. Such action must be begun on or before the first Monday in February of the year succeeding the year in which the taxes were levied, and a failure to begin such action is deemed a waiver of the rights of action."

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By this statute the State of California has made a general provision whereby it consents to be sued in its own courts in actions of the nature of the case at bar. Has it consented to be sued in the Federal court? The State has the unquestioned right to select the forum in which it shall be sued, to prescribe the manner in which the suit shall be conducted, and to impose upon the prosecution of the action any condition that may be deemed proper. It may even retract its permission to be sued after an action has been begun. Railroad Co. *v.* Alabama, 101 U. S., 832. Examining the section just quoted, it will be seen that conditions are imposed which are wholly incompatible with a consent to be sued in the United States courts. It is made a condition of the action, that at the time when the treasurer demurs or answers, he may demand that the case be tried in the superior court of the county of Sacramento. That condition is a valid one, and it conserves a substantial right to the State. It could not be complied with in an action in the United States court. No cause can be transferred from the United States circuit court for the northern district of California to the superior court of the State of California for Sacramento county. Again, it is provided in the same section that "the provisions of the Code of Civil Procedure, relating to pleadings, proofs, trials and appeals, are applicable to the proceedings herein provided for."

Although practice in the Federal courts conforms as nearly as may be to that of the State courts in actions at law, there are certain features in which their procedure is controlled by acts of Congress, from which the Federal courts are not at liberty to deviate in response to any provision of a State statute, and the

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clause of the language just quoted in reference to appeals could have no application whatever in a proceeding in the United States court. By this provision in regard to appeals, it was clearly the intention of the legislature to make the supreme court of the State of California the court of last resort to pass upon all questions which might arise in such an action. It was intended that the rights of litigants in such a suit should be subject to the construction which that court should finally adopt. That provision secures to the State the most substantial right which is conserved to it in the section just quoted, and presents an insurmountable obstacle to the prosecution of the action in a court of the United States.

But it is urged by the plaintiff in error that the Atlantic & Pacific Railroad Company is not a citizen of another State, nor a citizen or subject of a foreign State, but is a corporation created under an act of Congress for the express purpose of acting as an agent for the Federal government, and is therefore not among those from whom, by the terms of the 11th amendment, the power to sue a State is withheld. The receiver stands upon the footing of the corporation itself. If the corporation had the right to sue the State of California, the receiver undoubtedly has succeeded to the right. It is only where the jurisdiction of the United States courts depends upon diverse citizenship that the citizenship of the receiver is to be regarded. New Orleans *v.* Gaines' Adm'r, 138 U. S., 595; 11 Sup. Ct., 428; American Nat. Bank *v.* National Benefit & Casualty Co., 70 Fed., 420; Brisenden *v.* Chamberlain, 53 Fed., 307. The effect of the eleventh amendment was to overrule the decision of the supreme court in the case of Chisholm *v.* Georgia, 2 Dall., 419, in which it had been said, under the terms of article 3 of the constitution, extending the judicial power of the United States to controversies between a State and the citizens of another State, that a State was subject to a suit by a citizen of another State. Said Mr. Jus-
81 tice Matthews *In re* Ayers, above cited: "The very object and purpose of the eleventh amendment were to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties." In Hans *v.* Louisiana, 134 U. S., 1; 10 Sup. Ct., 504, it was held that the purpose of the eleventh amendment was to recognize the sovereignty of the State, and to declare that the judicial power of the United States was never intended by the framers of the Constitution to extend to suits by individuals against a State, and that the amendment should not be so construed as to inhibit only suits at the instance of the particular classes of citizens named therein, but that it applied as well to suits against a State by its own citizens. The jurisdiction of the court in that case was invoked upon the ground that a Federal question was involved in the controversy. The principles announced in the decision are conclusive of the question which is now before us. But we find a further and complete answer to the contention of the plaintiff in error. The jurisdiction of the United States court in the present case is not invoked upon the ground that the controversy presents a case arising under the Constitution or laws of the United States. Nor can jurisdiction be claimed upon the

ground of the diverse citizenship of the parties, since, as we have seen, the State itself is a party. It must rest upon some other grant of jurisdiction. The only other grant under which it could be claimed is that which is contained in section 2 of article 3 of the Constitution, declaring that the judicial power of the United States shall extend to controversies "between a State and citizens of another State, * * * and between a State or the citizens thereof and foreign States, citizens or subjects." The plaintiff in error must find in this provision his right to proceed in a Federal court, and if the Atlantic & Pacific Railroad Company is not a citizen of a State, or a citizen or subject of a foreign State, the controversy is not among those of which jurisdiction is conferred upon the United States courts by the Constitution. It follows that the circuit court erroneously entertained jurisdiction of the cause. For want of jurisdiction the judgment of dismissal is affirmed.

Endorsed: Opinion. Filed May 3, 1898. F. D. Monckton, clerk.

82 United States Circuit Court of Appeals for the Ninth Circuit.

C. W. SMITH, as Successor to J. W. Reinhart, John J. McCook, and Joseph C. Wilson as Receivers of the At. & Pac. R. R. Co., and Receiver of the Atlantic & Pac. R. R. Company, Plaintiff in Error,
v.
LEVI RACKLIFFE, as Treasurer of the State of California, Defendant in Error.
} No. 422.

In error to the circuit court of the United States for the northern district of California.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the northern district of California and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause be, and the same is hereby, affirmed.

(Endorsed:) Judgment. Filed May 3, 1898. F. D. Monckton, clerk.

83 In the United States Circuit Court of Appeals for the Ninth Circuit.

C. W. SMITH, Successor to J. W. Reinhart, John J. McCook, and Joseph C. Wilson as Receivers of the Atlantic & Pacific Railroad Company, as Receiver of the Atlantic & Pacific Railroad Company, Plaintiff in Error,

v.

LEVI RACKLIFFE, as Successor in Office to J. R. McDonald, as Treasurer of the State of California, Defendant in Error.

No. 422. Stipulation.

It is hereby stipulated and agreed by and between W. F. Fitzgerald, as attorney general of the State of California and as representing Levi Rackliffe, late treasurer of the State of California, and who is now authorized to and does represent W. S. Green, the present treasurer of the State of California, and C. W. Smith, as receiver of the Atlantic & Pacific Railroad Company, plaintiff in the above-entitled cause, as follows, to wit:

Whereas the defendant in the above-entitled cause, Levi Rackliffe, departed this life on April 21, 1898; and

Whereas W. S. Green was, on the 22nd day of April, 1898, duly and legally appointed his successor in office, and the said Green did, on the 22nd day of April, 1898, duly qualify as the treasurer of the State of California and entered upon the discharge of his duties as such treasurer, and has since that time been and now is the duly appointed, qualified, and acting treasurer of the State of California and successor in office of the defendant, Levi Rackliffe:

Now, therefore, it is stipulated and agreed by and between
84 said parties that the said W. S. Green shall be substituted as defendant in the above-entitled cause of action by the United States circuit court of appeals, and that he shall appear upon the records in said cause as having been substituted as defendant therein on and since the 22nd day of April, 1898, and that all proceedings had in said court subsequent to such date shall be deemed to have been had with him as a party to such suit, and said action shall be revived and proceed and remain as an action pending against him as treasurer of the State of California, to the same extent and as completely as though he had been treasurer from the commencement of it.

C. N. STERRY,
Attorney for Plaintiff in Error.
W. F. FITZGERALD,
Attorney General of the State of California.

(Endorsed:) Stipulation as to substitution of W. S. Green as defendant in error. Filed Oct. 10, 1898. F. D. Monckton, clerk.

85 At a stated term, to wit, the October term, A. D. 1898, of the United States circuit court of appeals for the ninth cir-

cuit, held at the court-room, in the city and county of San Francisco, on Monday, the tenth day of October, in the year of our Lord one thousand eight hundred and ninety-eight.

Present: The Honorable William B. Gilbert, circuit judge; Honorable Erskine M. Ross, circuit judge; Honorable Thomas P. Hawley, district judge.

C. W. SMITH, as Successor to J. W. Reinhart *et al.*, etc., Receiver of the Atlantic & Pacific Railroad Company, Plaintiff in Error,
v.
LEVI RACKLIFFE, as Treasurer of the State of California, Defendant in Error. } No. 422.

It appearing to the court that the defendant in error in the above-entitled cause, Levi Rackliffe, late treasurer of the State of California, died on April 21, 1898, and that on April 22, 1898, W. S. Green was duly and legally appointed the successor in office of the said Levi Rackliffe, deceased, and duly qualified as the treasurer of the State of California and entered upon the discharge of his duties as such treasurer, and has since that time been and now is the duly appointed, qualified, and acting treasurer of the State of California and successor in office of the said Levi Rackliffe, and that it has been stipulated and agreed by and between C. N. Sterry, Esq., as attorney for the plaintiff in error in the above entitled cause, and W. F. Fitzgerald, Esq., attorney general of the State of California, who represented in the above-entitled cause the said Levi Rackliffe, late treasurer of the State of California, and who is now authorized to and does represent W. S. Green, the present treasurer of the State of California, that the said W. S. Green shall be substituted as defendant in the above-entitled cause, and that he shall appear upon the records in said cause as having been substituted as defendant therein on and since the 22nd day of April, 1898, and that all proceedings had in this court subsequent to said date shall be deemed to have been had with him as a party to said suit, and that said cause shall be revived and proceed and remain as a cause pending against him as treasurer of the State of California to the same extent and as completely as though he had been treasurer from the commencement thereof:

Now, on motion of E. S. Pillsbury, Esquire, it is ordered, pursuant to the said stipulation, that the said W. S. Green, as treasurer of the State of California and successor in office to the said Levi Rackliffe, be, and he is hereby, substituted a defendant in error in the above-entitled cause as defendant in error *nunc pro tunc* as of the 22nd day of April, 1898, and that all proceedings had in this court subsequent to the 22nd day of April, 1898, shall be deemed to have been had with him, the said W. S. Green, as treasurer of the State of California, to the same extent and as completely as though he had been treasurer from the commencement of the above-entitled cause.

86 In the United States Circuit Court of Appeals for the Ninth Circuit.

C. W. SMITH, Successor to J. W. Reinhart, John J. McCook, and Joseph C. Wilson as Receivers of the Atlantic & Pacific Railroad Company, as Receiver of the Atlantic & Pacific Railroad Company, Plaintiff in Error,

vs.

LEVI RACKLIFFE, as Successor in Office to J. R. McDonald as Treasurer of the State of California, Defendant in Error.

} No. 422.

Stipulation.

It is hereby stipulated and agreed by and between Tirey L. Ford, as attorney general of the State of California, who is now authorized to and does represent Truman Reeves, the present treasurer of the State of California and successor in office of W. S. Green, ex-treasurer of the State of California, and C. N. Sterry, attorney for C. W. Smith, as receiver of the Atlantic & Pacific Railroad Company, plaintiff in the above-entitled cause, as follows, to wit:

Whereas the defendant in the above-entitled action, W. S. Green, was such treasurer down to the 2nd day of January, 1899, at 12 o'clock m.; and

Whereas, at a general election held in the State of California on the 8th day of November, 1898, Truman Reeves was duly elected to succeed the said W. S. Green as such treasurer of the State of California, and thereafter, to wit, on the 2nd day of January, 1899, at 12 o'clock m., did succeed the said W. S. Green in office, as aforesaid, and ever since has been and now is the duly elected, qualified, and acting treasurer of the State of California:

87 Now, therefore, it is stipulated and agreed by and between said parties that the said Truman Reeves shall be substituted as defendant in the above-entitled cause of action by the United States circuit court of appeals, and that he shall appear upon the records in said cause as having been substituted as defendant therein on and since the 2nd day of January, 1899, at 12 o'clock m., and that all proceedings had in said court subsequent to such date shall be deemed to have been had with him as a party to such suit, and said action shall be revived and proceed and remain as an action pending against him as treasurer of the State of California to the same extent and as completely as though he had been treasurer from the commencement of it.

C. N. STERRY,
Attorney for Plaintiff in Error.
TIREY L. FORD,
Attorney General of the State of California,
By GEO. A. STURTEVANT,
Deputy Attorney General.

(Endorsed:) Stipulation substituting Truman Reeves for W. S. Green. Filed Feb. 7, 1899. F. D. Monckton, clerk.

88 At a stated term, to wit, the October term, A. D. 1898, of the United States circuit court of appeals for the ninth circuit, held at the court room, in the city and county of San Francisco, on Tuesday, the seventh day of February, in the year of our Lord one thousand eight hundred and ninety-nine.

Present: The Honorable William B. Gilbert, circuit judge; the Honorable Erskine M. Ross, circuit judge; the Honorable William W. Morrow, circuit judge.

C. W. SMITH, as Successor to J. W. Reinhart *et al.*, etc., Receiver of the Atlantic & Pacific Railroad Company, Plaintiff in Error,
vs.
W. S. GREEN, as Treasurer of the State of California (Substituted, etc.), Defendant in Error.
} No. 422.

Now, at the February, 1899, session of this court, the plaintiff above named appeared, by his attorney, C. N. Sterry, in open court, and thereupon there was presented to the court a stipulation, signed by the respective counsel, containing, among other things, the statement that on the 2nd day of January, 1899, Truman Reeves became the duly elected, qualified, and acting treasurer of the State of California, and the said stipulation further provided that the said Truman Reeves as such treasurer should be substituted as defendant in the above-entitled cause as from and after January 2, 1899.

Thereupon, upon motion of the plaintiff, based upon said stipulation, it is ordered and adjudged that Truman Reeves, as treasurer of the State of California, be, and he is hereby, declared to be the defendant in the above-entitled action, substituted as such in his official capacity in the place and stead of W. S. Green, said substitution to take effect as of January 2nd, 1899.

89 In the United States Circuit Court of Appeals for the Ninth Circuit.

C. W. SMITH, as Successor of J. W. Reinhart, John J. McCook, and Joseph C. Wilson as Receivers of the Atlantic & Pacific Railroad Company, and Receiver of the Atlantic & Pacific Railroad Company, Plaintiff in Error,
vs.
TRUMAN REEVES, as Treasurer of the State of California and Successor in Office of W. S. Green as Treasurer of the State of California, and Successor in Office of the Late Levi Rackliffe, Defendant in Error.

Petition for Writ of Error.

Comes now C. W. Smith, successor of J. W. Reinhart, John J. McCook, and Joseph C. Wilson as receivers of the Atlantic & Pa-

cific Railroad Company, and receiver of the Atlantic & Pacific Railroad Company, plaintiff in error, by C. N. Sterry, his attorney, and complains that in the record and proceedings, and also in the rendition of the judgment in the suit pending in the above-entitled court, wherein C. W. Smith, as successor of J. W. Reinhart, John J. McCook, and Joseph C. Wilson as receivers of the Atlantic & Pacific Railroad Company, and as receiver of the Atlantic & Pacific Railroad Company, was and is plaintiff in error, and Truman Reeves, as treasurer of the State of California and as successor in office of W. S. Green as treasurer of the State of California, and as successor in office of the late Levi Rackliffe, was and is defendant in error, which was heard and tried in said court, and wherein a judgment was by said court rendered on the third day of May, 1898, affirming the judgment of the United States circuit court for the northern district of California, in said court rendered, manifest error has intervened in the judgment, order, and proceedings had in
90 this court, to the great damage of your petitioner; that since the rendition of said judgment Truman Reeves, treasurer of the State of California and as successor in office to the said W. S. Green, has by order of court been substituted as defendant in said cause.

Wherefore your petitioner prays for allowance of a writ of error and such other process as may cause the errors maintained in the rendition of such judgment to be corrected by the Supreme Court of the United States and cause the reversal of said judgment for such errors by the Supreme Court of the United States.

C. N. STERRY,
Attorney for Plaintiff in Error.

Order Allowing Writ of Error.

A writ of error is allowed as herein prayed for.
Dated March 6th, 1899.

WILLIAM B. GILBERT,
Judge of the United States Circuit Court of Appeals for the Ninth Circuit.

(Endorsed:) Petition for writ of error and order allowing same. Service of copy of the within petition for writ of error is hereby acknowledged this 6th day of March, 1899. Tirey L. Ford and Geo. A. Sturtevant, deputy, attorneys for defendant in error. Filed Mar. 6, 1899. F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit.

91 In the United States Circuit Court of Appeals for the Ninth Circuit.

C. W. SMITH, as Successor of J. W. Reinhart, John J. McCook, and Joseph C. Wilson as Receivers of the Atlantic & Pacific Railroad Company, and Receiver of the Atlantic & Pacific Railroad Company, Plaintiff in Error,

vs.

TRUMAN REEVES, Treasurer of the State of California, and as Successor in Office of W. S. Green as Treasurer of the State of California, and Successor in Office of the Late Levi Rackliffe, Defendant in Error.

Assignment of Errors.

Comes now C. W. Smith, successor of J. W. Reinhart, John J. McCook, and Joseph C. Wilson as receivers of the Atlantic & Pacific Railroad Company, and receiver of the Atlantic & Pacific Railroad Company, plaintiff in error in the above-entitled cause, and complains of the defendant in error, Truman Reeves, treasurer of the State of California, and successor in office of W. S. Green as treasurer of the State of California and as successor in office of the late Levi Rackliffe, now deceased, for that the said W. S. Green, as treasurer of the State of California, defendant in error in the above-entitled cause, did, on the third day of May, 1898, recover a judgment by the consideration of the United States circuit court of appeals, ninth circuit, in the above-entitled cause against the plaintiff in error, affirming the judgment of the United States circuit court for the northern district of California, theretofore rendered in said cause against the said C. W. Smith as such receiver. A copy of the record in said cause in said court, duly certified, is hereto attached and made a part hereof. That since the rendition

92 of the said judgment, and upon the 7th day of February, 1899, Truman Reeves, as treasurer of the State of California and successor in office of the said W. S. Green, was by the court duly substituted as the defendant in said cause. Plaintiff avers that there is error in said record and proceedings in this, to wit:

1st. The United States circuit court of appeals erred in determining that the circuit court of the United States for the northern district of California was without jurisdiction in said cause.

2d. The United States circuit court of appeals for the ninth circuit erred in determining that the circuit court of the United States for the northern district of California rightfully sustained the demurrer interposed in said cause by the late Levi Rackliffe, as treasurer of the State of California and predecessor in interest in said cause to W. S. Green, late treasurer of the State of California, and in the place of whom has been substituted Truman Reeves, the present treasurer of said State and defendant in error herein.

3d. The United States circuit court of appeals for the ninth circuit erred in affirming the judgment of the United States circuit court for the northern district of California, entered in the cause

wherein C. W. Smith, successor of J. W. Reinhart, John J. McCook, and Joseph C. Wilson as receivers of the Atlantic & Pacific Railroad Company, and as receiver of the Atlantic & Pacific Railroad Company, and Levi Rackliffe as treasurer of the State of California and predecessor in interest of Truman Reeves as treasurer of the State of California, the defendant in said cause, dismissing said action at the cost of said C. W. Smith as such receiver; all of which will fully appear by reference to the record attached to said petition in error.

Wherefore said C. W. Smith, as such receiver, prays that
93 a writ of error be issued, in order that the errors above stated and set forth, if any there have been, may be duly corrected and full and speedy justice done the parties aforesaid in this behalf, and that the defendant be restored to all the rights lost by the erroneous ruling of the court herein complained of.

C. N. STERRY,
Attorney for Plaintiff in Error.

(Endorsed:) Assignment of errors. Service of a copy of the within assignment of errors is hereby acknowledged this 6th day of March, 1899. Tirey L. Ford, attorney general, and Geo. A. Sturtevant, deputy, attorney for defendant in error. Filed Mar. 6, 1899. F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit.

94 Know all men by these presents that we, C. W. Smith, as receiver of the Atlantic & Pacific Railroad Company, as principal, and W. C. Patterson and W. D. Woolwine, as sureties, are held and firmly bound unto Truman Reeves, as treasurer of the State of California and successor in office to W. S. Green as late treasurer of the State of California, in the full and just sum of $500.00, to be paid to the said Truman Reeves, as such treasurer, his heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 17th day of February, in the year of our Lord one thousand eight hundred and ninety-nine.

Whereas lately, at the October, 1896, term of the United States circuit court of appeals for the ninth circuit, in a suit pending in said court between C. W. Smith, as successor of J. W. Reinhart, John J. McCook, and Joseph C. Wilson as receivers of the Atlantic & Pacific Railroad Company, and receiver of the Atlantic & Pacific Railroad Company, plaintiff in error, and Truman Reeves, treasurer of the State of California and successor in office to W. S. Green as treasurer of the State of California, and successor in office of the late Levi Rackliffe, defendant in error, judgment was rendered against the said C. W. Smith as such receiver, plaintiff in error, affirming the judgment of the United States circuit court for the northern district of California, heretofore rendered in said cause, and dismissing said cause, and the said C. W. Smith, as such receiver, has obtained a writ of error to the said court to reverse the

judgment and decision of the United States circuit court of appeals, as aforesaid, and a citation directed to the said Truman
95 Reeves as such treasurer, citing and admonishing him to be and appear in the Supreme Court of the United States sixty days from and after the date of said citation:

Now, the condition of the above obligation is such that if the said C. W. Smith as such receiver, plaintiff in error, shall prosecute said writ of error to effect and answer all damages and costs if he shall fail to make good his plea, then the above obligation to be void; else to remain in full force and effect.

In witness whereof we have the day and year above written signed and sealed the foregoing instrument.

C. W. SMITH, [SEAL.]
Receiver of the Atlantic & Pacific Railroad Company.
W. C. PATTERSON. [SEAL.]
W. D. WOOLWINE. [SEAL.]

Approved by—
WM. B. GILBERT,
United States Circuit Judge and One of the Judges of the United States Circuit Court of Appeals for the Ninth Circuit.

(Endorsed:) Bond on writ of error. Filed Mar. 6, 1899. F. D Monckton, clerk U. S. circuit court of appeals for the ninth circuit.

96 United States Circuit Court of Appeals for the Ninth Circuit.

C. W. SMITH, as Successor to J. W. Reinhart, John J. McCook, and Joseph C. Wilson as Receivers of the At. & Pac. R. R. Co., and Receiver of the Atlantic & Pac. R. R. Company, Plaintiff in Error,
vs.
TRUMAN REEVES, as Treasurer of the State of California (Substituted for W. S. Green as Treasurer of the State of California *nunc pro tunc* as of January 2nd, 1899), Defendant in Error.
} No. 422.

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, do hereby certify the forgoing ninety-five (95) pages, numbered from one (1) to ninety-five (95), inclusive, to be a true copy of the record and of the assignment of errors and of all proceedings in said United States circuit court of appeals, including the opinion filed in the above-entitled case, as the same appear of record in said circuit court of appeals, and that the same constitute the return to the annexed writ of error.

Seal United States Circuit Court of Appeals, Ninth Circuit.

Attest my hand and the seal of said United States circuit court of appeals for the ninth circuit, at San Francisco, California, this 9th day of March, A. D. 1899.

F. D. MONCKTON, *Clerk.*

[Ten-cent U. S. internal-revenue stamp, canceled March 9, '99. F. D. M.]

97 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of appeals of the United States for the ninth circuit, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said United States circuit court of appeals, before you or some of you, between C. W. Smith, as successor of J. W. Reinhart, John J. McCook, and Joseph C. Wilson as receivers of the Atlantic & Pacific Railroad Company, and receiver of the Atlantic and Pacific Railroad Company, plaintiff in error, and W. S. Green, as treasurer of the State of California and successor in office of the late Levi Rackliffe, defendant in error, in whose place and stead Truman Reeves, as successor in office to the said W. S. Green, has since been substituted as defendant by order of said court, a manifest error hath happened, to the great damage of said plaintiff in error, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be there given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, at the city of Washington, District of Columbia, within sixty days from the date hereof, that, the
98 record and proceedings aforesaid being inspected, the said court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the sixh day of March, in the year of our Lord one thousand eight hundred and ninety-nine.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,
Clerk of the United States — Court of Appeals, Ninth Circuit.

Allowed, and the clerk of the circuit court of appeals for the ninth circuit is directed to sign and seal this writ.

WILLIAM B. GILBERT,
United States Circuit Judge for the Ninth Judicial Circuit and One of the Justices of the United States Circuit Court of Appeals, Ninth Circuit.

UNITED STATES OF AMERICA, *ss:*

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, with all things concerning the same.

In witness whereof I hereto subscribe my name and affix the seal of the United States — court of appeals, ninth circuit.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON,
Clerk United States Circuit Court of Appeals for the Ninth Circuit.

99 [Endorsed:] No. 422, doct. Dept. —. In the U. S. circuit court of appeals, ninth circuit, State of California. C. W. Smith, receiver, plaintiff in error, *vs.* Truman Reeves, as treasurer, etc., defendant in error. Writ of error. Service is hereby acknowledged this 6th day of March, 1899. Tirey L. Ford, attorney general, and Geo. A. Sturtevant, deputy, attorney- for defendant in error. C. N. Sterry and Henry J. Stevens, rooms 543 to 546 Bradbury bldg., Los Angeles, Cal., attorneys for plaintiff in error. Filed Mar. 6, 1899. F. D. Monckton, clerk *clerk* U. S. circuit court of appeals for the ninth circuit.

100 The United States of America to Truman Reeves, as treasurer of the State of California and successor in office to W. S. Green, as late treasurer of the State of California, and who was successor in office of the late Levi Rackliffe, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at the city of Washington, District of Columbia, sixty days from and after the day this citation bears date, pursuant to writ of error filed in the clerk's office of the United States circuit court of appeals for the ninth circuit, wherein C. W. Smith, as successor of J. W. Reinhart, John J. McCook, and Joseph C. Wilson as receivers of the Atlantic & Pacific Railroad Company, and as receiver of the Atlantic & Pacific Railroad Company, is plaintiff in error, and you, as such treasurer of the State of California, are defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Wm. B. Gilbert, judge of the circuit court of the United States for the ninth judicial circuit and one of the judges of the United States circuit court of appeals for the ninth circuit, this 6th day of March, in the year of our Lord one thousand eight hundred and ninety-nine.

WILLIAM B. GILBERT,
United States Circuit Judge for the Ninth Judicial Circuit.

101 [Endorsed:] No. 422, doct. Dept. —. In the United States circuit court of appeals, ninth circuit, State of California. C. W. Smith, receiver, plaintiff in error, *vs.* Truman Reeves, as treasurer, defendant in error. Citation. Filed Mar. 6, 1899. F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit. C. N. Sterry and Henry J. Stevens, rooms 543 to 546 Bradbury bldg., Los Angeles, Cal., attorneys for plaintiff in error.

Personal service of the within citation upon Truman Reeves, as treasurer of the State of California, is hereby waived, and the undersigned is authorized to, and hereby does, appear herein as the attorney for said Truman Reeves as said treasurer.

TIREY L. FORD, *Attorney General, and*
GEO. A. STURTEVANT, *Deputy,*
Attorneys for Truman Reeves.

San Francisco, March 6th, 1899.

Endorsed on cover: File No., 17,337. U. S. C. C. of appeals, 9th circuit. Term No., 242. C. W. Smith, as successor of J. W. Reinhart, John J. McCook, & Joseph C. Wilson as receivers of the Atlantic & Pacific Railroad Company, & receiver of the Atlantic & Pacific Railroad Company, plaintiff in error, *vs.* Truman Reeves, as treasurer of the State of California & successor in office to W. S. Green as late treasurer of the State of California, & who was successor in office of the late Levi Rackliffe. Filed March 28th, 1899.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

C. W. Smith, as Receiver of the Atlantic & Pacific Railroad Company,

Plaintiff in Error,

vs.

Truman Reeves, as Treasurer of the State of California,

Defandant in Error.

BRIEF OF PLAINTIFF IN ERROR.

Statement of the Case.

This cause was originally commenced in the Circuit Court of the United States for the Northern District of California by three receivers of the Atlantic & Pacific Railroad Company (theretofore appointed by that court in an action therein pending) against the then treasurer of the state of California, J. R. McDonald. A demurrer and motion to dismiss were filed by the then defendant, and, upon a hearing before Judge McKenna, Circuit Judge, the demurrer was sustained. The original defendant having died, and C. W. Smith having been appointed receiver, as successor to the original receivers, an amended complaint was filed against the successor in office of McDonald, as treasurer, by Smith, as receiver, on an order substituting him as plaintiff and the successor of McDonald as defendant. To this amended complaint a demurrer was filed, and, upon a hearing before Justice Morrow, as Circuit Judge, this demurrer was sustained, and the action

dismissed, at the cost of the receiver. Subsequently, the present treasurer of the state of California was as the successor in office of the former defendant substituted as defendant by an order of the court duly made. This cause was taken by a writ of error from the judgment of the Circuit Court to the Circuit Court of Appeals, for the ninth circuit, and upon a hearing in that court, the judgment of the court below was affirmed, and this writ of error, is to bring for review to this court, the judgment of the United States Circuit Court of Appeals for the ninth circuit.

The facts stated in the amended complaint are substantially as follows:

The Atlantic & Pacific Railroad Company was incorporated by the act of congress approved July 27, 1866. Under this act of congress, one portion of the railroad chartered to be built, which is known as the "Western Division," was, prior to 1884, constructed from Isleta Junction in the territory of New Mexico, to the west bank of the Colorado river, at the crossing thereof provided for by its charter. Upon reaching this point it connected with a branch of a railroad built by the Southern Pacific Railroad Company, a corporation incorporated under the general statutes of California; approved May 20, 1861. This company, under its articles of incorporation and under the 18th section of the act of congress, approved July 27, 1866, and the joint resolution of congress, approved June 28, 1870, and the act of the legislature of California, approved April 4, 1870, constructed this branch road from its main line at Mojave to the Colorado river, a distance of about 243 miles and there connected with the Atlantic & Pacific Railroad (Western Division.)

On August 20, 1884, the Atlantic & Pacific Railroad Company, the St. Louis & San Francisco Railroad Company, (a Missouri corporation), the Atchison, Topeka & Santa Fé Railroad Company, (a Kansas corporation), and the Southern Pacific Railroad Company, entered into a written contract for the lease and sale of this branch line of road from Mojave to the west bank of the Colorado river, to the Atlantic & Pacific Railroad Company, under the provisions of the 2nd section of the act of the legislature of the state of California, approved April 3, 1880. [See appendix.] The Atlantic & Pacific Railroad Company took possession of this branch line of road, October 1st, 1884, under this contract, and from that time it, and its several receivers,

have been continually in possession of the same, operating it in connection with its western division.

This line of road from Mojave to the Colorado river, built by the Southern Pacific Railroad Company, formed at the date of this lease, a part of a large system of railroads in the state of California and elsewhere, owned by the Southern Pacific Railroad Company, which consisted of over a thousand miles of connected railroad in the state of California alone. By the terms of the contract, of lease and sale of August 20th, 1884, the Atlantic & Pacific Railroad Company was to pay the taxes levied upon any assessment of this leased line of road. No steps were ever taken under the contract of August 20th, 1884, to consummate the sale of this road, and since that time it has been operated by the Atlantic & Pacific Railroad Company and its receivers as a leased line, in connection with the line of the Atlantic & Pacific, which, in its turn, formed a link in the system of the Atchison, Topeka & Santa Fé Railroad Company.

That at the proper time, in the year 1893, the Southern Pacific Railroad Company, under and in pursuance of the provisions of section 10, article 13, of the constitution of the state, and section 3664 of the Political Code of the state of California (see *post*), returned to the state board of equalization of that state, a statement such as was required by said section 3664, for the purpose of enabling the state board to assess certain of its property. This statement included in it the *franchise, roadway, roadbed, rails and rolling stock of its entire railroad system in the state of California, including in it the line of railroad so leased to the Atlantic & Pacific Railroad Company.* This leased line, as well as other lines of the Southern Pacific, ran into more than one county in the state of California. Upon this return, the state board of equalization, at its August session in the year 1893, assessed the franchise, roadbed, rails and rolling stock *of all* the line of railroad returned by the Southern Pacific to it; and apportioned the total assessment so made of the property of the Southern Pacific Railroad Company, to the counties and cities through which the system owned by said company ran in the state, in accordance with the constitution and revenue laws of the state. Under this assessment, *the mileage of this leased line of railroad was a portion of the entire mileage of the Southern Pacific in the state (which, in its entirety, was,*

with its franchise, roadway, roadbed, rails and rolling stock, assessed as a unit at a lump sum, as the property of the Southern Pacific,) just the same as though it had not been leased, and the counties and cities through which the leased line runs were assigned the proportion of the total assessment of the entire Southern Pacific System, including "franchise, roadway, roadbed, rails and rolling stock" of such system in the proportion that the mileage of this leased line in such counties and cities bore to the entire mileage of the entire system in the state.

During all the time that the Atlantic & Pacific Railroad Company operated this leased line it used some portion of its own rolling stock upon it. This rolling stock was never permanently in the state of California, and was only transiently in it, and consisted of cars and locomotives, etc., running in and out of the state, constantly, and never permanently stopping in the state.

The state board of equalization at its August, 1893, meeting, against the objection and protest of the Atlantic & Pacific Railroad Company, assessed a portion of the Atlantic & Pacific Railroad Company's entire rolling stock alone and by itself, at the total value of $123,000, assessing it on the basis of $515.44 a mile of this leased line of railroad, and apportioned this assessment to the two counties, through which the leased line ran, at such rate per mile, to wit: At the rate of $515.44 per mile in each of the counties of Kern and San Bernardino. It, at the same time, had apportioned to each of these counties proper proportion of the assessment of the Southern Pacific system, as stated, upon the basis of the mileage of this leased line of railroad therein, at the aggregate sum of $9,303.95 per mile; included in the last assessment was a *pro rata* portion of the assessed value of the franchise, and the assessed value of all the rolling stock of the Southern Pacific. The state board, at the same session, levied upon this assessment of this rolling stock of the Atlantic & Pacific taxes in the gross sum of $2,272.80; and also levied upon the assessment of the franchise, roadway, roadbed and rolling stock of the Soutaern Pacific apportioned to these two counties taxes in the gross sum of $33,981.58, making a double assessment and taxation of rolling stock to this line of railroad.

This levy of $2,272.80 was paid to the state treasurer prior to June 1, 1894, by the receivers, who had then been appointed and had taken possession of the Atlantic & Pacific Railroad Company's prop-

erty at that time. The receivers of the Atlantic & Pacific then made a written demand upon the treasurer for the repayment of this amount so paid, under the provisions of section 3669 of the Political Code, [*see post*] and this action was commenced pursuant to the provisions of this section, to recover back the amount so paid, upon the theory that the state board of equalization had no jurisdiction to assess or to levy taxes upon any part of the rolling stock of the Atlantic & Pacific Railroad Company.

This case has had a somewhat peculiar history, in this: Upon the hearing before Judge McKenna, it was urged by the defendant; first: that the court had no jurisdiction, of the subject-matter of the action; second: that the facts stated in the complaint did not constitute a cause of action. Judge McKenna, overruled the claim of the defendant, that the court, had no jurisdiction of the subject-matter, of the action, but sustained the demurrer upon the other ground. [Tr. p. 22.] See, also, opinion of Judge Morrow, upon the hearing before him upon the demurrer to the amended complaint. [Tr. p. 27.]

From the opinion delivered by Judge McKenna, and also from the opinion delivered by Judge Morrow, it appears, that the demurrers were sustained, upon the theory, that, while the receivers of the Atlantic & Pacific Railroad Company, had the right to bring such an action, in that court, yet that the facts stated, in the complaint, and amended complaint, disclosed that the assessment, was a valid assessment, and, that, therefore, the taxes sought to be recovered were valid legal taxes, which company was legally compelled to pay. When the case reached the United States Circuit Court of Appeals, the defendant in error, (without having filed any cross petition in error), again raised the objection, overruled by Judge McKenna, that the court below, was without jurisdiction, to entertain such a cause of action, on behalf of plaintiff in error, and this contention, was sustained by the Court of Appeals, without passing upon the other question, and the decision of that court, affirming the judgment of the court below, was based solely, and entirely, upon the proposition, that the court below, was without jurisdiction, to entertain such a cause of action, on behalf of the receivers of the Atlantic & Pacific Railroad Company. [See opinion of Justice Gilbert, pages 36 to 41, inclusive, of transcript.]

SPECIFICATION OF THE ERRORS RELIED UPON.

1st. The United States Circuit Court of Appeals erred in determining that the Circuit Court of the United States for the northern district of California was without jurisdiction in said cause.

2nd. The United States Circuit Court of Appeals for the ninth circuit erred in determining that the Circuit Court of the United States for the northern district of California rightfully sustained the demurrer interposed in said cause by the late Levi Rackliffe, as treasurer of the state of California and predecessor in interest in said cause to W. S. Green, late treasurer of the state of California, and in place of whom was substituted Truman Reeves, the present treasurer of said state and defendant in error herein.

3rd. The United States Circuit Court of Appeals for the ninth circuit erred in affirming the judgment of the United States Circuit Court for the northern district of California, entered in the cause wherein C. W. Smith, successor of J. W. Reinhart, John J. McCook and Joseph C. Wilson, as receivers of the Atlantic & Pacific Railroad Company, and as receiver of the Atlantic & Pacific Railroad Company; and Levi Rackliffe, as treasurer of the state of California and predecessor in interest of Truman Reeves as treasurer of the state of California, the defendant in said cause, dismissing said action at the cost of said C. W. Smith, as such receiver; all of which will fully appear by reference to the record attached to said petition in error.

POINTS, ARGUMENTS AND AUTHORITIES.

FIRST POINT.

The receivers of the Atlantic & Pacific Railroad Company had the right to bring an action, in the Circuit Court of the United States for the northern district of California, to recover any money due to the Atlantic & Pacific Railroad Company prior to their appointment, under the provisions of section 2, article 3, of the constitution of the United States, and the provisions of section 1 of the act of congress, approved August 13, 1888, regardless of the citizenship of the parties to the litigation.

I.

That the Atlantic & Pacific Railroad Company being a corporation created by the act of congress, approved July 27, 1866 [14 U. S. Stat., p. 292], had under the many decisions of this court the right to assert any cause of action, where the amount in value exceeded $2000, in any Circuit Court of the United States against any party, regardless of citizenship of the parties to such action, under the provisions of section 2, article 3, of the constitution of the United States, and the provisions of section 1 of the act of congress approved August 13, 1888, must, we think, be conceded.

Chief Justice Marshall, in the case of Osborn *v.* United States Bank (9 Wheat. 738), uses language which might have been written of and concerning the Atlantic & Pacific Railroad Company, as follows:

"The charter of incorporation not only creates it, but gives it every faculty which it possesses. The power to acquire rights of any description, to transact business of any description, to make contracts of any description, to sue on those contracts, is given and measured by its charter, and that charter is a law of the United States. This being can acquire no right, make no contract, bring no suit which is not authorized by a law of the United States. It is not only itself the mere creature of a law, but all its actions and all its rights are dependent on the same law."

This question was again very carefully considered by this court in the Pacific removal cases (115 U. S. 1), and the doctrine enunciated

by Chief Justice Marshall affirmed. The proposition was again affirmed in the later case of N. P. R. R. Co. *v.* Amato (144 U. S. 465), and Sou. Kansas R. R. Co. *v.* Briscoe (144 U. S. 133).

II.

The Atlantic & Pacific Railroad Company having the right to invoke the jurisdiction of the federal courts, the receivers appointed to take possession of its property, and rights in action, were invested with the right to invoke the same jurisdiction.

T. & P. R. R. Co. *v.* Cox, 145 U. S. 593;

McNulty *v.* Lockridge, 141 U. S. 327.

We have presented this question at length because it is perfectly evident that (the proposition and authorities above cited were presented to the court below by the reply brief of the plaintiff in error) the court below misunderstood the position of the plaintiff in error, in this respect, as will be seen by the following quotation from the opinion of the court, delivered by Justice Gilbert, to wit:

"But we find a further and complete answer to the contention of the plaintiff in error. The jurisdiction of the United States court in the present case is not invoked upon the ground that the controversy presents a case arising under the constitution or laws of the United States." [Pr. Tr. p. 40.]

III.

These receivers having been appointed by the Circuit Court of the United States, for the northern district of California, to take possession of all the property, and rights in action, within that district, had the right to bring any suit, for the collection of the assets of the Atlantic & Pacific Railroad Company, in that court which had appointed them, regardless of citizenship, amount or anything else.

Porter *v.* Sabin, 149 U. S. 473;

White *v.* Ewing, 159 U. S. 36.

The court below, consisting of the same judges, in the case of Keihl *v.* City of South Bend (76 Fed. 921), had previously fully recognized this proposition, as will be seen from the first point in the syllabi of that case, which reads as follows;

"Where the subject matter of an action involves the acts and rights of a receiver appointed by a federal court, it constitutes a case arising under the laws of the United States, and is therefore within the jurisdiction of a federal court."

SECOND POINT.

Under the provisions of section 3669 of the Political Code of California, the Circuit Court of the United States for the northern district of California had the same jurisdiction of the subject matter of the cause of action stated in the amended complaint as a state court would have had.

I.

Section 3669 of the Political Code of the state of California reads as follows:

"3669. *Certain taxes must be paid to state treasurer.* Each corporation, person or association assessed by the state board of equalization must pay to the state treasurer, upon the order of the controller, as other moneys are required to be paid into the treasury, the state and county and city and county taxes each year levied upon the property so assessed to it or him by said board. Any corporation, person, or association dissatisfied with the assessment made by the board, upon the payment of the taxes due upon the assessment complained of, and the percentage added, if to be added, on or before the first Monday in June, and the filing of notice with the controller of an intention to begin an action, may, not later than the first Monday in June, bring an action against the state treasurer for the recovery of the amount of taxes and percentage so paid to the treasurer, or any part thereof, and in the complaint may allege any fact tending to show the illegality of the tax, or of the assessment upon which the taxes are levied, in whole or in part. A copy of the complaint and of the summons must be served on the treasurer within ten days after the complaint has been filed, and the treasurer has thirty days within which to demur or answer. At the time the treasurer demurs or answers, he may demand that the action be tried in the Superior Court of the county of Sacramento. * * *"

The decision of the court below, that the United States Circuit Court, for the northern district of California, has no jurisdiction of any cause of action, brought under the above statute, under any circumstances, is, we believe, erroneous. Section 629 of the revised statutes, as amended March 3, 1887, and corrected August 13, 1888 [25 U. S. Stat. 433], reads:

"The Circuit Court of the United States will have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the constitution or laws of the United States * * * or in which there shall be a controversy between citizens of different states, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid."

Under an unbroken line of decisions by this court, based upon substantially this statute, this court has always adhered to the proposition, that the grant to the federal courts of a jurisdiction "concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity" prevents any state, from confining the right created by statute or otherwise to bring a suit of a civil nature, at common law, or in equity, in the state courts alone, where a party, having the right to bring such suit, can invoke the aid of a federal court.

Suydam *v.* Broadnax *et al.*, 14 Pet. 67;

Union Bank *v.* Vaiden *et al.*, 18 How. 503.

The second point of the syllabi in the case of Hyde *et al. v.* Stone [20 How. 170], reads as follows:

"The jurisdiction of the courts of the United States over controversies between citizens of different states cannot be impaired by the laws of the states, which prescribe the modes of redress in their own courts, or which regulate the distribution of their judicial power."

The second point of the syllabi in the case of Cowles *v.* Mercer County [7 Wall. 118], reads as follows:

"The statutes of a state limiting the jurisdiction of suits against counties to Circuit Courts held within such counties can have no application to courts of the national government."

See, also, the case of Broderick's Will. [21 Wall. 503.]

We quote, as quite applicable to the proposition contended for, from the opinion in the case of *Ex parte* McNiel [13 Wall. 236], as follows:

"It is urged further that a state law could not give jurisdiction to the District Court. That is true. A state law cannot give jurisdiction to any federal court; but that is not a question in this case. A state law may give a substantial right of such a character that where there is no impediment arising from the residence of the parties, the right may be enforced in the proper federal tribunal, whether it be a court of equity, of admiralty, or of common law. The statute in such cases does not confer the jurisdiction. That exists already, and it is invoked to give effect to the right by applying the appropriate remedy. This principle may be laid down as axiomatic in our national jurisprudence. A party forfeits nothing by going into a federal tribunal. Jurisdiction having attached, his case is tried there upon the same principles, and its determination is governed by the same considerations, as if it had been brought in the proper state tribunal of the same locality. In no class of cases has the application of this principle been sustained by this court more frequently than in those of admiralty and maratime jurisdiction."

As was said by Justice Swayne in the case of Davis *v.* Gray [16 Wall. 203]:

"A party by going into a national court does not lose any right or appropriate remedy of which he might have availed himself in the state courts of the same locality. The wise policy of the constitution gives him a choice of tribunals. In the former he may hope to escape the local influence which sometimes disturb the even flow of justice. And in the regular course of procedure, if the amount involved be large enough, he may have access to this tribunal as the final arbiter of his rights."

See also:

County of Lincoln *v.* Luning, 133 U. S. 529;

Gaines *v.* Fuentes, 92 U. S. 10.

Justice Brown, in delivering the opinion of this court in the case of Cowley *v.* N. P. R. R. Co. (159 U. S. 568), uses this language:

"Although the statute of a state or territory may not restrict or limit the equitable jurisdiction of the federal courts, and may not directly enlarge such jurisdiction, it may establish new rights or privileges which the federal courts may enforce on their equity or admiralty side, precisely as they may enforce a new right of action given by statute upon their common law side."

See also, Chicot County Arkansas *v.* Sherwood *et al.*, 148 U. S. 529, in which the following language is used:

"If, therefore, the presentation of a demand to the county court under the Arkansas statute is not the commencement of a suit against the county, then, under the rule stated in Delaware County Commissioners *v.* Diebold Safe and Lock Co., just quoted, the court to which such demand may be carried after allowance or rejection receives and determines it as an original cause. In either case the suit is so maintainable in the state courts as to be cognizable by original process in a federal court, where the parties have the proper citizenship to confer jurisdiction. Any other view of the subject would prevent citizens of other states from resorting to the federal courts for the enforcement of their claims against counties of the state and limit them to the special mode of relief prescribed by the act of February 27, 1879. The jurisdiction of the federal courts is not to be defeated by such state legislation as this."

We quote from the opinion of Justice Brewer in the case of Reagan *v.* Farmers Loan & Trust Co. (154 U. S. 360), as follows:

"Nor can it be said in such a case that relief is obtainable only in the courts of the state. For it may be laid down as a general proposition that, whenever a citizen of a state can go into the courts of the state to defend his property against the illegal acts of its officers, a citizen of another state may invoke the jurisdiction of the federal courts to maintain a like defense. A state cannot tie up a citizen of another state, having property rights within its territory invaded by unauthorized acts of its own officers, to suits for redress in its own courts. Given a case where a suit can be maintained in the courts of

the state to protect property rights, a citizen of another state may invoke the jurisdiction of the federal courts. Mercer County Suprs. *v.* Cowles, 74 U. S. 7 Wall. 118 (19: 86); Lincoln County *v.* Luning, 133 U. S. 529 (33: 766); Chicot County *v.* Sherwood, 148 U. S. 529 (37: 546.)"

In Smyth *v.* Ames (169 U. S. 464), it is distinctly affirmed by Justice Harland, in his opinion based upon the many decisions of this court, that any one who has the right to go into a federal court and invoke its jurisdiction, may assert in such court, any right, that he could possibly assert in a state court, and that the state is powerless to enact any statute to prevent the assertion of such a right in a federal court.

The question was again reviewed by this court in the late case of Blake *et al v.* McClung *et al.*, (172 U. S. 239).

See also, cases in the Circuit Court of Appeals, 8th circuit:

Thompson *v.* Searcy County, 57 Fed. 1030;

Edwards *v.* Hill *et al.*, 59 Fed. 723.

THIRD POINT.

The state board of equalization of the state of California had no jurisdiction under either the Constitution or statutes of the state of California to make the assessment complained of.

I.

In our judgment, for the purpose of this case, it is not at all material to inquire into the question as to whether the rolling stock of the Atlantic & Pacific Railroad Company, which was assessed by the state board of equalization, and upon which the tax complained of was levied, was assessable or taxable in the state of California, it being sufficient for the purposes of this case, to show that the state board of equalization had no jurisdiction to assess it, as in such case the levy of the tax which was levied upon such assessment was absolutely void and entitled the plaintiff to recover under the statute referred to.

II.

Section 10, article 13, of the constitution, reads as follows:

"All property except as hereinafter in this section provided, shall be assessed in the county, city, city and county, town, township, or district in which it is situated, in the manner prescribed by law. The franchise, road-way, road-bed, rails and rolling stock of all railroads operated in more than one county in this state shall be assessed by the state board of equalization, at their actual value, and the same shall be apportioned to the counties, cities and counties, cities, towns, townships and districts in which such railroads are located, in proportion to the number of miles of railway laid out in such counties, cities and counties, cities, towns, townships and districts."

This section of the constitution is mandatory in its terms, and requires all property of every kind and description that can be assessed for taxation in this state to be assessed "*in the county, city, city and county, town, township, or district in which it is situated, in the manner prescribed by law,*" except certain classes of property belonging to railroads operated in more than one county in the state. The property of a railroad which is *operated in more than one county* in the state that is to be assessed by the state board of equalization, is specifically described, and all other property belonging to such a railroad must be assessed locally under the mandate of this provision.

To enable the state board of equalization to assess the "franchises," or the "roadway," or the "roadbed," or "the rails and rolling

stock" of any railroad, it must be the "franchise, the roadway, the roadbed, rails and rolling stock" of a railroad "*operated in more than one county in the state.*" These things are all in conjunction and make a complete whole; no one or more of them not belonging to, and not a part of a railroad "operated in more than one county in the state" can be assessed by the state board of equalization. At the time of the assessment in controversy the provisions of the act of the legislature of California approved March 31, 1891, (Stats. and amendments to codes of California, 1891, page 438), were in full force and effect, and sections 3665, 3666 and 3667 of the Political Code as amended by this act, read as follows, so far as this question is concerned:

"3665. * * * At such meeting the board must assess the franchise, roadway, roadbed, rails and rolling stock of all railroads operated in more than one county. * * * Assessments must be made to the corporation, person, or association of persons owning the same. The depots, stations, shops, and buildings erected upon the space covered by the right of way, and all other property owned by such person, corporation, or association of persons, are assessed by the assessor of the county wherein they are situate. Within twenty days after the first Monday of August, the board must apportion the total assessment of the franchise, roadway, roadbed, rails and rolling stock of each railway to the counties, or cities and counties, in which such railway is located, in proportion to the number of miles of railway laid in such counties, and cities and counties. The board must also, within said time, transmit, by mail, to the county auditor of each county, or city and county, to which such apportionment shall have been made, a statement showing the length of the main track of such railway within the county, or city and county, with a description of the said track within the county, or city and county, including the right of way, by metes and bounds, or other description sufficient for identification, the assessed value per mile of the same, as fixed by a pro rata distribution per mile of the assessed value of the whole franchise, roadway, roadbed, rails and rolling stock of such railway within the state, and the amount apportioned to the county, or city and county. The auditor must enter the statement on the assessment roll or book of the county, or city and county, and where the county is divided into assessorial townships or districts, then on the roll or book of any township or district he may select, and enter the amount of the assessment apportioned to the county, or city and county, in the column of the assessment book or roll as aforesaid, which shows the total value of all property for taxation, either of the county, city and county, or such township or district. On the fourth Monday in September the board of supervisors must make, and cause to be entered in the proper record book, an order stating and declaring the length of main track of the railway assessed by the state board of equalization within the county, the assessed value per mile of such railway, the number of miles of track, and the assessed value of such railway lying in each city, town, township, school and road district, or lesser taxation district in the county, or city and county, through which such railway

runs, as fixed by the state board of equalization, which shall constitute the assessment value of said property for taxable purposes in such city, town, township, school, road, or other district; and the clerk of the board of supervisors must transmit a copy of each order or equalization to the city council, or trustees, or other legislative body of incorporated cities or towns, the trustees of each school district, and the authorized authorities of other taxation districts through which such railway runs. All such railway property shall be taxable upon said assessment at the same rates, by the same officers and for the same purposes, as the property of individuals within such city, town, township, school, road, and lesser taxation districts, respectively. If the owner of a railway assessed by the state board of equalization is dissatisfied with the assessment made by the board, such owner may, at the meeting of the board, under the provisions of section three thousand six hundred and ninety-two of the Political Code, between the first Monday in August and the first Monday in September, apply to the board to have the same corrected in any particular, and the board may correct and increase or lower the assessment made by it so as to equalize the same with the assessment of other property in the state. If the board shall increase or lower any assessment previously made by it, it must make a statement to the county auditor of the county affected by the change in the assessment of the change made, and the auditor must note such change upon the assessment book or roll of the county, as directed by the board."

"3666. The state board of equalization must prepare each year a book, to be called 'Record of Assessment of Railways,' in which must be entered each assessment made by the board, either in writing or by both writing and printing. Each assessment so entered must be signed by the chairman and clerk. The record of the apportionment of the assessment made by the board to the counties, and cities and counties, must be made in a separate book, to be called 'Record of Apportionment of Railway Assessments.' In such last described book must be entered the names of the railways assessed by the board, the names of the corporation to which, or the name of the person or association to whom, each railway was assessed, the whole number of miles of the railway in the state, the number of miles thereof in each county, or city and county, the total assessment of the franchise, roadway, roadbed, rails and rolling stock, for purposes of state taxation, and the amount of the apportionment of such total assessment to each county, and city and county, for county, and city and county, taxation. Before the third Monday of September of each year, the clerk of the state board of equalization must prepare and transmit to the controller of state duplicates of the 'record of assessment of railways' and 'record of apportionment of railway assessments,' each certified by the chairman and clerk of the board, and to be known respectively, as 'duplicate record of assessment of railways' and 'duplicate record of apportionment of railway assessments.' In the last named duplicate, two columns must be added, in one of which the controller must enter the state taxes due the state upon the whole assessment, by each corporation, person, or association, and in the other the county, or city and county, taxes due upon the assessment apportioned to each county, or city and county, by each corporation, person, or association. The two duplicates constitute the warrant for

the controller to collect the state and county, and city and county, taxes levied upon such property assessed by the board, and the amount of the apportionment of the assessment to each county, and city and county, respectively."

"3667. When the board of supervisors of each county, and city and county, to which the state board of equalization has apportioned the assessment of railways, shall have fixed the rate of county, or city and county taxation, the clerk of the board of supervisors must forthwith, by mail, postage paid, transmit to the controller a statement of the rate of taxation levied by the board of supervisors for county, or city and county taxation. If the clerk fails to transmit such statement, the controller must obtain the information as to such rate of taxation from other sources. On or before the second Monday of October, the controller must compute and enter in separate money columns in the 'duplicate record of apportionment of railway assessments' the respective sums, in dollars and cents, rejecting fractions of a cent, to be paid by the corporation, person, or association liable therefor, as the state tax upon the total amount of the assessment, and the county, or city and county, tax upon the apportionment of the assessment to each county, and city and county, of the property assessed to such corporation, person, or association named in said duplicate record."

It will be seen from the foregoing statutes that the legislature intended that the state board of equalization should assess "the franchise, roadway, roadbed, rails and rolling stock" of any railroad operated in more than one county as a unit, and in a total aggregate sum, to be divided by the total mileage of the road to which these several things belong.

In the earliest case, decided by the Supreme Court of California after the adoption of the new constitution [S. F. & N. P. R. R. Co. *v.* State Board of Equalization, 60 Cal. 12], that court had to determine several questions as to the duties of the state board of equalization, under this section of the constitution and statutes enacted to enforce it, similar to those above quoted, and we quote from the decision in that case as follows:

"Thus by the very language of the constitution all other but the railroad property mentioned must be assessed by the local assessors, in the manner prescribed by the statute; the railroad property must be assessed in the manner prescribed by the sections of the constitution. [8 Pac. L. J. 103.] * * *

"The constitution does not, in terms, require that the assessed value of each item should be separately *apportioned* to the several counties; and that the Political Code does not contemplate such separate distribution is sufficiently apparent from section 3650. That section provides that the assessor shall prepare an assessment book, in which must be specified in separate columns, under appropriate heads:

1. The *names* of persons assessed: *2.* Land by township, etc.; *3.* City and town lots; *4.* Personal property, showing number, kind, etc.; *5.* Cash value of real estate, etc.; *6.* Of personal property; *7.* Money; *8.* 'The assessment of the *franchise, roadbed*', etc.; such as may have been made by the state board and furnished to him; * * * *14.* Total value of all property. It thus appears that while as to assessments made by the assessor the kinds are to be separately stated, the assessment by the state board of the 'franchise, roadbed,' etc., is entered in one column and as a single item."

Again, in the case of People *v.* C. P. R. R. Co., (83 Cal. 406), the Supreme Court of California said:

"It will be borne in mind that the constitution provides for a difference in the mode of assessment only, not in the mode of levy or of collection of the tax on the property when assessed. Under the constitution, it became necessary, or if not necessary at least proper, for the legislature to pass laws providing the details for the assessment and apportionment of the assessment, of this class of property by the state board of equalization It is the only property in the state of which that board is authorized by the constitution to make assessment, and as the board is only authorized to make such assessment when the property is situate in two or more counties, apportionment thereof to the several counties became necessary. To provide for the details of that apportionment, and of notice to the several counties interested, it became necessary and proper that the legislature should act, and in so far as its action relates to the assessment and the apportionment thereof, it is not attacked as being in conflict with the constitution."

Again, in the case of R. R. Co. *v.* Mecartney, 104 Cal. 616, the court says: (The italics are ours.)

"Counsel for appellant cites several provisions from the code in regard to the assessment of railroads by the state board of equalization which seem to indicate that the roadway, roadbed, and rolling stock are to be valued together. This matter is fully explained in *San Francisco, etc., R. R. Co. v. State Board*, 60 Cal. 12. The constitution provides a mode in which the state board shall fix its valuations. This must be construed, so far as it differs from the general rule, as an authorized exception. In the above case reference is made to the code provisions requiring the county assessor to specify and separately assess different species of property, and it is said: 'It thus appears that while as to assessments made by the assessor, the kinds are to be separately stated, *the assessment by the state board of the franchise, roadbed, etc., is entered in one column and as a single item.*' "

In the very important case of The People *v.* C. P. R. R. Co., decided by the Supreme Court in bank, and reported in 105 Cal. 576, the court, speaking through Justice Harrison, in drawing the distinction between the assessment of property other than that required by

the constitution to be assessed by the state board of equalization and that required to be so assessed, used the following language (except we have italicized a portion of it):

"Such provisions are inapplicable to the railroads under consideration, so far as concerns that portion of their property which is assessed by the state board of equalization. It must be borne in mind that only a portion of their property, viz., the 'franchise, roadway, roadbed, rails and rolling stock, of railroads operated in more than one county, is thus assessed. The depots, stations, shops and buildings erected upon the space covered upon the right of way are assessed by the assessor of the county in which they are situated, and the taxes upon this property are collected in the same mode as are taxes from other individuals. The constitution provides that after the state board of equalization has made the assessment of the franchise, roadway, roadbed, rails and rolling stock at their actual value, the same shall be apportioned to the counties in proportion to the mileage in the different counties. It is the 'value of the property after it has been assessed that is to be apportioned to the several counties. There is no apportionment to the counties of the property itself or of any particular part of that property. Upon the assessment book of the several counties the assessment that is apportioned by the state board of equalization does not contain a description of the property within that county, or any designation of property upon which the taxes that may be levied could constitute a lien. Only the apportioned part of the assessed value is entered upon the books of the county auditor as the basis of the taxes to be levied with the county, the amount upon which the percentage of tax is to be computed, and from which is derived the amount of taxes to be paid by the railroad. The nature of the property required to be assessed by the state board of equalization shows that the property itself is incapable of being apportioned, and that there could be no description entered upon the books which could serve as the basis of a sale or conveyance. Even if the roadway within the county could be described there could be no apportionment to the several counties of the franchise or of the rolling stock which could serve as a description or be capable of transfer. *The franchise is a unit, and can be transferred only as a unit, and the rolling stock has no particular situs in any county, but, in connection with the roadway and roadbed, are essential for the enjoyment of the franchise, while the whole—the franchise, roadway, roadbed, rails and rolling stock—constitute an entirety incapable of division.* If the taxes for any county that are levied against the railroad upon this apportionment by the state board of equalization are delinquent there is no description of property within that county which can be advertised or incorporated into a certificate of sale and deed."

This case was affirmed by the Supreme Court of the United States in the case of C. P. R. R. Co. *v.* The People of the State of California, 162 U. S. 903.

These decisions of the Supreme Court of the States of California, in construing this constitutional provision, and these statutes must, by the federal courts, be read into the statute, as a part of them.

In Douglass *v.* County of Pike [101 U. S. 677], this court said:

"As a rule, we treat the construction which the highest court of the state has given the statute of that state as a part of the statute, and govern ourselves accordingly."

See, also, the late case of Long Island Water Supply Co. *v.* City of Brooklyn [166 U. S. 685], and cases there cited.

As was said by Justice Baker, in the case of Lapp *et al.* *v.* Ritter, [88 Fed. 108:]

"A decision by the highest court of a state, construing a statute of the state, is as binding upon the federal courts as though the construction so given had been written in the statute by the legislature itself."

III.

It is the rolling stock *of a railroad*, and not the rolling stock *used* on any railroad operated in more than one county in the state that is to be assessed by the state board of equalization. The rolling stock in question that was assessed was the rolling stock of the Atlantic & Pacific Railroad, which was not being operated as a railroad in the state of California, and did not run at any time into any county, much less into two counties of the state. The rolling stock assessed was used on a portion of a railroad having rolling stock of its own which had been assessed as a part of the line of road it belonged to and its total value apportioned along that portion of the line of road which had been leased

IV.

It will not be contended but that, if the right to make this assessment was beyond the jurisdiction of the state board, the tax levied upon this assessment was illegal; and, having been paid, can be recovered back.

In the well considered opinion of the Supreme Court in bank in the case of City and County of San Francisco *v.* C. P. R. R. Co., 63 Cal. 467, it was determined that the board had not the right to assess

the ferry steamers operating as a part of the Central Pacific Railroad in transporting people from its own line of road to the city of San Francisco.

In the case of Santa Clara County *v.* S. P. R. R. Co., 118 U. S. 394, this court held that where the state board of equalization of California included in its assessment of a railroad running into more than one county, the value of fences erected by the railroad company on its right of way, that such action vitiated the entire assessment and rendered it void.

In the cases commencing with the case of the People of the State of California *v.* C. P. R. R. Co. (all reported in 127 U. S. 1); the question came before this court as to the power of the state board of California (under a statute authorizing it so to do), to assess bridges, culverts, wharves, etc., under section 3665 of the Political Code, as amended by the act of March 9, 1883, with the other things to be assessed; and in that case, this court, speaking through Justice Bradley, of the jurisdiction granted to the state board by the constitution and statutes, says:

"The last section shows explicitly that, in regard to a railroad, the state board has power to assess only five things—the franchise, roadway, roadbed, rails and rolling stock; the county boards are authorized to assess all the rest of the property. If the state board includes in its assessment any more of the railroad property than it is authorized to do, the assessment will be *pro tanto* illegal and void."

Can it be said that the principle involved in the above decision would be any less applicable to a case where the state board has no jurisdiction over the railroad to which the franchise or the rolling stock belongs, but yet would proceed to assess either the franchise or the rolling stock? Again, suppose the state board should assess the franchise of a railroad company, as it assessed the rolling stock of the Atlantic & Pacific, although it did not own a foot of railroad in the state, would not such assessment be void and would not such franchise, if assessable at all, be assessable locally in each taxing district where the same was used?

V.

The court must bear in mind that the demurrer admits the facts to be that the railroad to which this rolling stock assessed belongs, had no existence in the state of California, and was not operated

therein, and that the railroad upon which the rolling stock was used, in this state, was assessed by the state board of equalization to its owner, in connection with the rolling stock belonging to it.

Assuming that this rolling stock was taxable in the state of California, it was taxable only on an assessment made by county or local assessors in the county and other municipalities in which it was used, and not upon assessments made by the state board of equalization, which had no authority on earth to assess rolling stock, except as it is part and parcel of a railroad that runs into, and is operated in more than one county in the state.

By the express terms of the constitution, as construed by the Supreme Court, "the franchise, roadway, roadbed, rails and rolling stock," are grouped together, and assessed as one thing, because each one is a necessary part and parcel of the complete thing, in which is vested certain public and private rights, and the evident intent of the constitution was that, when all these things existed together, and were used in more than one county, they should be assessed as one thing by the state board, instead of being assessed by local officers.

Under the facts admitted by the demurrer this case presents the fact that the state board of equalization assessed a lot of rolling stock belonging to a railroad corporation which neither owned nor operated a railroad in California (except as lessee) and assessed it *separately and independently from the franchise, roadway, roadbed and rails, of the railroad to which it belonged*, thereby usurping, as we think, the right and duty of the local authorities, if, under the facts alleged in the complaint, this property was subject to taxation in the state of California.

This litigation has been pending for several years in this state, and was undoubtedly brought home to the attention of the last legislature, which specifically amended the provisions of the revenue act so as to have a line situated like the Mojave line, assessed to the lessee, and to have the rolling stock used by the lessee upon it, assessed as part of the value of such leased line as though it belonged to it. [See amendment to Sec. 3665, Pol. Code, by act of legislature, 1897, appendix.] This, to say the least, is a legislative interpretation that the right did not exist prior to this statute.

VI.

The principles determined by the Supreme Court of the United States in the case of Marye *v.* Baltimore, etc., R. R. Co., 127 U. S. 117, are, we believe, precisely applicable and controlling in this case.

All of which is very respectfully submitted.

C. N. STERRY,

Attorney for Plaintiff in Error.

APPENDIX.

Section 2 of the acts of the California legislature, approved April 3d, 1880, reads as follows:

"Sec. 2. Railroad corporations doing business in this state and organized under any law of this state, or the United States, or of any state or territory thereof, have power to enter into contracts with one another, whereby the one may lease of the other the whole or any part of its railroad, or may acquire of the other the right to use, in common with it, the whole or any part of its railroad."

Sections 3664 and 3665 of the Political Code, as amended by the act of the legislature, approved April 1, 1897:

"3664. The president, secretary, or managing agent, or such other officer as the state board of equalization may designate of any corporation, and each person, or association of persons, owning or operating any railroad in more than one county in this state, shall, on or before the first Monday in April of each year, furnish the said board a statement, signed and sworn to by one of such officers, or by the person or one of the persons forming such association, showing in detail for the year ending on the first Monday in March in each year:

"1. The whole number of miles of railway in the state, and, where the line is partly out of the state, the whole number of miles without the state, and the whole number within the state, owned or operated by such corporation, person, or association;

"2. The value of the roadway, roadbed, and rails of the whole railway, and the value of the same within the state;

"3. The width of the right of way;

"4. The number of each kind of all rolling stock used by such corporation, person, or association in operating the entire railway, including the part without the state;

"5. Number, kind, and value of rolling stock owned and operated in the state;

"6. Number, kind, and value of rolling stock used in the state, but owned by the party making the returns;

"7. Number, kind, and value of rolling stock owned, but used out of the state, either upon divisions of road operated by the party making the returns, or by and upon other railways;

"Also showing in detail for the year preceding the first of January:

"1. The gross earnings of the entire road;

"2. The gross earnings of the road in the state, and where the railway is let to other operators, how much was derived by the lessor as rental;

"3. The cost of operating the entire road, exclusive of sinking fund, expenses of land department, and money paid to the United States;

"4. Net income for such year, and amount of dividend declared;

"5. Capital stock authorized;

"6. Capital stock paid in;

"7. Funded debt;

"8. Number of shares authorized;

"9. Number of shares of stock issued;

"10. Any other facts the state board of equalization may require;

"11. A description of any part or portion of such railroad which may be in the possession and control of any other railroad company or corporation, and operated by such other corporation under a lease or other contract;

"12. The president, secretary, or managing agent, or such other officer as the state board of equalization may designate of any corporation or association of persons operating in this state any portion of a line of railroad owned by and belonging to some other corporation or association, which runs in more than one county, shall make the same statement as is herein required to be made by the foregoing provisions of this section by the owner of such railroad;

"13. A description of the road, giving the points of entrance into and the points of exit from each county, with a statement of the number of miles in each county. When a description of the road shall once have been given, no other annual description thereafter is necessary, unless the road shall have been changed. Whenever the road, or any portion of the road, is advertised to be sold, or is sold for taxes, either state or county, no other description is necessary than that given by, and the same is conclusive upon the corporation, person, or association giving the description. No assessment is invalid on account of a misdescription of the railway, or the right of way for the same. If such statement is not furnished as above provided, the assessment made by the state board of equalization upon the property of the corporation, person, or association failing to furnish the statement is conclusive and final. [*In effect 60 days from April 1, 1897.*]

"3665. The state board of equalization must meet at the state capitol on the third Monday in July, and continue in open session from day to day Sundays excepted, until the first Monday in August. At such meeting the board must assess the franchise, roadway, roadbed, rails, and rolling stock of all railroads operated in more than one county, but franchises derived from the United States shall not be assessed. Assessments must be made to the corporation, person, or association of persons owning the same. If any portion of any railroad, less than the whole is operated by some corporation or association of individuals other than the owner of such railroad, under lease or other contract, and such portion so operated runs into more than one county, the value of such part or portion of such railroad shall be assessed separate and apart from the balance of said railroad, and the board shall assess the roadway, roadbed, and rails of such portion of such railroad, together with the rolling stock used thereon by the corporation or association of individuals operating the same. The depots, stations, shops, and buildings erected upon the space covered by the right of way, and all other property owned by such person, corporation or association of persons, are assessed by the assessor of the county wherein they are situate. Within twenty days after the first Monday of August, the board must apportion the total assessment of the franchise, roadway, roadbed, rails, and rolling stock of each railway to the counties, or cities and counties, in which such railway is located, in proportion to the number of miles of railway laid in such counties, and cities and coun-

ties. The board must also, within said time, transmit, by mail, to the county auditor of each county, or city and county, to which such apportionment shall have been made, a statement showing the length of the main track of such railway within the county, or city and county, with a description of the said track within the county, or city and county, including the right of way, by metes and bounds, or other descriptions sufficient for identification, the assessed value per mile of the same, as fixed by a pro rata distribution per mile of the assessed value of the whole franchise, roadway, roadbed, rails, and rolling stock of such railway within the state, and the amount apportioned to the county, or city and county. The auditor must enter the statement on the assessment roll or book of the county, or city and county, and where the county is divided into assessorial townships or districts, then on the roll or book of any township or district he may select, and enter the amount of the assessment apportioned to the county, or city and county, in the column of the assessment book or roll as aforesaid, which shows the total value of all property for taxation, either of the county, city and county, or such township or district. On the fourth Monday in September, the board of supervisors must make, and cause to be entered in the proper record book, an order stating and declaring the length of main track of the railway assessed by the state board of equalization within the county, the assessed value per mile of such railway, the number of miles of track, and the assessed value of such railway lying in each city, town, township, school and road district, or lesser taxation district in the county, or city and county, through which such railway runs, as fixed by the state board of equalization, which shall constitute the assessment value of said property for taxable purposes in such city, town, township, school, road or other district; and the clerk of the board of supervisors must transmit a copy of each order or equalization to the city council, or trustees or other legislative body of incorporated cities or towns, the trustees of each school district and the authorized authorities of other taxation districts through which such railway runs. All such railway property shall be taxable upon said assessment at the same rates, by the same officers, and for the same purposes, as the property of individuals within such city, town, township, school, road, and lesser taxation districts, respectively. If the owner of a railway assessed by the state board of equalization is dissatisfied with the assessment made by the board, such owner may, at the meeting of the board, under the provisions of section three thousand six hundred and ninety-two, of the Political Code, between the first Monday in August and the first Monday in September, apply to the board to have the same corrected in any particular, and the board may correct and increase or lower the assessment made by it so as to equalize the same with the assessment of other property in the state. If the board shall increase or lower any assessment previously made by it, it must make a statement to the county auditor of the county affected by the change in the assessment of the the change made, and the auditor must note such change upon the assessment book or roll of the county, as directed by the board." [*In effect 60 days from April 1, 1897.*

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1899.

No. 242.

C. W. SMITH, as Receiver of the Atlantic & Pacific Railroad Company,
Plaintiff in Error,
vs.
TRUMAN REEVES, as Treasurer of the State of California,
Defendant in Error.

REPLY BRIEF.

In reply to the argument made by the Attorney General, (in his brief for defendant in error) in support of the proposition that the United States Circuit Court could not entertain jurisdiction of this cause, by reason of the prohibition contained in the 11th amendment of the constitution of the United States, we have to say:

FIRST.

The Atlantic & Pacific Railroad Company was created by an act of Congress (approved July 27, 1866) "for national purposes and to serve national ends." (California v. C. P. Ry. Co., U. S. 1), and is and was not a citizen of another

state, or a citizen or a subject of any foreign state, and is not within the letter, or even the spirit, of the 11th amendment of the constitution of the United States.

The only provision of the constitution of the United States applicable to the case under consideration, is that portion of section 2, article 3, which says:

"The judicial power shall extend to all causes in law and equity arising under this constitution, the laws of the United States and treaties made or which shall be made under their authority * * * the controversies between a state and citizens of another state * * * ."

The modification of this provision created by the adoption of the 11th amendment, reading as follows: "The judicial power of the United States shall not be construed to extend to any suit, in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state," did not affect the right of a federal corporation to invoke the aid of a federal court for the enforcement of its rights therein.

If the modification contained in the 11th amendment does not affect the Atlantic & Pacific Railroad Company, it could not affect the receivers of it, as such receivers stood exactly in the same position that the Atlantic & Pacific Railroad Company was in, itself, relative to any of its rights.

T. & P. R. R. Co. v. Cox, 145 U. S.. 593.
McNulta v. Lochridge, 141 U. S., 327.

Again, the receivers brought this suit as officers of the Circuit Court of the United States, having the right to proceed in the court of their appointment, regardless of citizenship or anything else.

Porter v. Sabin, 149 U. S., 473.
White v. Ewing, 159 U. S., 36.

As officers of the court they were not within the inhibition of the 11th amendment.

SECOND.

The State of California, by the adoption of section 3669 of the Political Code (quoted in original brief of plaintiff in error, page 11, and in brief of defendant in error, page 2,) attempted to inaugurate the policy of compelling everyone whose property was assessed by the state board of equalization to pay to the state treasurer all the taxes levied upon such assessment for state, county, city and other municipal purposes, regardless of any or all claims that such taxes were illegal. The state said, by the provisions of this section, to all: However illegal the taxes levied and sought to be collected are, you must pay the same over to the state treasurer, without contest, and then the state gives you this remedy, by which you can test the question of the legality of the taxes and recover the same back, if such taxes or any portion thereof are determined by the courts to be illegal. This statute recognized, and was based upon the principle determined by this court in the case of Erskine v. Van Aisdale, 15 Wall., 75,) in which the court says:

"Taxes illegally assessed and paid may always be recovered back if the collector understands from the payer that taxes are illegal, and that suit will be instituted to recover them."

This statute requires as the conditions thereof that such suit must be brought not later than the first Monday in June, following the year the taxes are due, the tax payer having first notified the state comptroller of an intention to bring the action. While the state treasurer, by force of the statute, must collect all taxes, including even those that are absolutely illegal, and which he officially has no right to collect, yet as to illegal taxes collected by force of this statute, he must be considered in the position of a public trustee who holds the money thus illegally collected, not for the state or

any of its municipalities, but in trust for the owner thereof. Even if this be not correct he does not collect or hold taxes collected upon such assessments, for the state alone, because he collects and holds such taxes for the counties and municipalities as well, and, therefore, a suit against him in his official capacity is, in fact, a suit against a statutory trustee of funds, and in such capacity he, the state treasurer, does not represent the state, in an action like the present one to recover a sum of money which he as state treasurer had neither the right to collect or hold after collection for anyone but the owner. The suit stands upon precisely the same footing as it would stand upon if this suit was against him as an officer who had forcibly collected illegal taxes by a seizure of the property assessed. The purpose of the statute was for the protection of the officer, in case of the collecting of illegal taxes by him so as to relieve him from the responsibility of collecting them by force where a levy would require him so to do. This statute cannot have the effect of placing him in any better position than he would be placed in if he had forcibly seized property belonging to the tax payer and sold it for the purpose of procuring money sufficient to satisfy the illegal levy, except that the measure of damages is fixed at the amount of taxes actually collected. In the case of the collection of illegal taxes by an officer of the state through seizure of property, this court, by an unbroken line of decisions, has held that the officer does not represent the state, and may be sued by the injured party to recover damages for the wrong done. It surely cannot be contended that a statute like the one under consideration which compels the payment of a levy of taxes, though such levy is illegal by giving the right to litigate afterwards the question of the legality thereof, places the tax payer in a worse position than he would be placed in if, in-

stead of paying the taxes in the manner required by the statute, such taxpayer forced the officer to a seizure and sale of his property in order to collect. As was said by the chief justice of this court, speaking for the court, in Exparte Tyler (149 U. S., 163), in summarizing the views heretofore expressed by the court in similar cases:

"The object of this petition was, we repeat, to protect the property, but even if it were regarded as a plenary bill in equity properly brought for the purpose of testing the legality of the tax, we ought to add that in our judgment it would not be obnoxious to the objection of being a suit against the state. It is unnecessary to re-travel the ground so often traversed by this court in exposition and application of the 11th amendment. The subject was but recently considered in Pennoyer v. McConnaughy, 140 U. S., 1, in which Mr. Justice Lamar, delivering the opinion of the court, cites and reviews a large number of cases. The result was correctly stated to be that where a suit is brought against defendants who claim to act as officers of a state, and, under color of an unconstitutional statute, commit acts of wrong and injury to the property of the plaintiff, to recover money or property in their hands unlawfully taken by them in behalf of the state, or for compensation for damages, in a proper case, for an injunction to prevent such wrong and injury; or for a mandamus in a like case to enforce the performance of a plain legal duty, purely ministerial; such suit is not, within the meaning of the amendment, an action against the state.

And while it was conceded that the principle stated by Chief Justice Marshall in the leading case of Osborn v. Bank of United States 22 U. S., 9 Wheat 738, that 'in all cases where jurisdiction depends on the party, it is the party named in the record,' and that 'the 11th amendment is limited to those suits in which a state is a party to the record,' had been qualified to a certain degree in some of the subsequent decisions of this court; yet it was also rightly declared that the general doctrine there announced that the curcuit courts of the United States will restrain a state officer from executing an unconstitutional statute of the state, when to execute it would be to violate rights and privileges of the complainant that had been guaranteed by the constitution and would do irreparable damage and injury to him, has never been departed from.

The views expressed in United States v. Lee, 106 U. S., 196; New Hampshire v. Louisiana, 108 U. S., 76; Re Ayers, 123 U. S., 443; Hans v. Louisiana, 134 U. S., 1; McGahey v. Virginia, 135 U. S., 662, and numerous other cases render further discussion unnecessary."

THIRD.

It has been distinctly and repeatedly held by this court that "an immunity from suit belonging to a state which is protected by the constitution, is a personal privilege which it may waive at pleasure."

Beers v. Arkansas, 20 How., 527;
Re Ayers, 123 U. S., 443;
Hans v. Louisiana, 134 U. S., 1;
Clark v. Barnard, 108 U. S., 436.

While it is true that a state when consenting to be sued may base such consent upon such conditions as it may choose to make and such conditions have to be observed, yet it cannot make, as one of such conditions, a condition that it can only be sued in its own courts upon a right of action given to all.

There are no conditions imposed by section 3669 of the Political Code, excepting, 1st: That notice shall be first given to the comptroller of an intention to bring suit; and, 2nd: That suit must be commenced before the first Monday in June of the year succeeding the year in which the taxes were levied. The privilege granted by the statute, to the treasurer, that he, at the time of demurring or answering the complaint, may demand that the action be tried in the superior court of the county of Sacramento, cannot and could not be regarded as valid, to the extent of preventing suit from being

brought in the federal court by a party who had the right to appeal to that court for the assertion of a statutory right or remedy. We quote the third and fourth points of the syllabi, in the case of Ry. Co. v. Whitten (13 Wall., 271) as much in point upon this question:

"3. A statute of Wisconsin provides that 'whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action to recover damages in respect thereof, then, and in every such case the person who, or the corporation which would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured; *provided that such action shall be brought for a death caused in this state, and in some court established by the constitution and laws of the same.*' *Held* that the provision requiring the action to be brought in a court of the state, does not prevent a non-resident plaintiff from removing the action, under the act of congress of March 2nd, 1867, to a federal court, and maintaining it there.

4. Whenever a general rule as to property or personal rights or injuries to either, is established by state legislation, its enforcement by a federal court in a case between proper parties is a matter of course, and the jurisdiction of the court in such case is not subject to state limitation."

We quote at length from the opinion of Justice Harlan, in the case of Smith v. Ames (169 U. S., 476), cited in our original brief, as follows.

"We cannot accept this view of the equity jurisdiction of the circuit courts of the United States. The adequacy or inadequacy of a remedy at law for the protection of the rights of one entitled upon any ground to invoke the powers of a federal court is not to be conclusively determined by the statutes of the particular state in which suit may be brought. One who is entitled to sue in the federal circuit court may invoke its jurisdiction in equity whenever the established principles and rules of equity permit such a suit in that court, and he cannot be deprived of that right by reason of his being allowed to sue at law in a state court on the same cause of action. It is true that an enlargement of equitable rights

arising from the statutes of a state may be administered by the circuit courts of the United States. Case of Broderick's Will (Keiley v. McGlynn), 88 U. S., 21, Wall. 503, 520; Holland v. Challen, 110 U. S., 15, 24; Dick v. Foraker, 155 U. S., 404, 415; Bardon v. Land and River Improv. Co., 157 U. S., 327, 330; Rich v. Braxton, 158 U. S., 375, 405. But if the case in its essence be one cognizable in equity, the plaintiff, the required value being in dispute, may invoke the equity powers of the proper circuit court of the United States whenever jurisdiction attaches by reason of diverse citizenship or upon any other ground of federal jurisdiction. Payne v. Hook, 74 U. S., 7 Wall., 425, 430; McConihay v. Wright, 121 U. S., 201, 205. A party, by going into a national court, does not, this court has said, lose any right or appropriate remedy of which he might have availed himself in the state courts of the same locality; that the wise policy of the constitution gives him a choice of tribunals. Davis v. Gray, 83 U. S., 16 Wall., 201, 221; Cowley v. Northern Pacific Railroad Co., 159 U. S., 569, 583. So, wherever a citizen of a state can go into the courts of a state to defend his property against the illegal acts of its officers, a citizen of another state may invoke the jurisdiction of the federal courts to maintain a like defense. A state cannot tie up a citizen of another state, having property rights within its territory invaded by unauthorized acts of its own officers to suits for redress in its own courts.' Reagan v. Farmers' Loan & Trust Co. (No. 1), 154 U. S., 362, 391; Mississippi Mills v. Cohn, 150 U. S., 202, 204, Cowles v. Mercer County, 74 U. S., 7 Wall., 118; Lincoln County v. Luning, 133 U. S., 529; Scott v. Neely, 140 U. S., 106; Chicot County v. Sherwood, 148 U. S., 529; Cates v. Allen, 149 U. S., 451."

The point made by the attorney general (top of page 9 of his brief), that the provisions of the Code of Civil Procedure relating to pleadings, proofs, trial and appeal, are conditions upon which actions may be brought under the provisions of section 3669 of the Political Code, has no force because of the fact that, by section 914 of the Revised Statutes of the United States, proceedings "in civil cases other than in equity and admiralty cases in the circuit and district courts are required to conform, as

near as may be, to the practice, pleadings and forms and mode of procedure existing at the time in like cases in the courts of the state within which such circuit or district courts are held, any rule of court to the contrary notwithstanding."

All of which is respectfully submitted.

C. N. STERRY,
Attorney for Plaintiff in Error.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

C. W. Smith, as Receiver of the Atlantic & Pacific Railroad Company,
Plaintiff in Error,

vs.

Truman Reeves, as Treasurer of the State of California,
Defendant in Error.

No. 242.

BRIEF OF DEFENDANT IN ERROR.

Statement of the Case.

In addition to the facts as stated by plaintiff in error, defendant in error adds the following:

The action was begun in the name of J. W. Reinhart, the former receiver of said road, and against J. R. McDonald, then the State Treasurer. To the said complaint a demurrer was interposed, upon the grounds, first, that the court had no jurisdiction of the subject-matter of the action, and, second, that the complaint failed to state facts sufficient to constitute a cause of action. The Circuit Court, McKenna, J., sustained the demurrer upon the second ground.

Plaintiff in error filed an amended complaint, containing a formal substitution of parties, the former defendant, McDonald, having gone out of office, and Levi Rackliffe succeeding him. To this amended complaint a demurrer was interposed upon the same grounds as heretofore. The Circuit Court, Morrow, J., again sustained the demurrer upon the second ground, and plaintiff in error declining to amend his complaint, his default was entered and judgment rendered for defendant in error, dismissing the action. Upon Writ of Error to the United States Circuit Court of Appeals, the defendant in error again raised the objection presented in the lower court, that the court was without jurisdiction of the subject-matter of

the action, upon the ground that it is an action against the State of California, and subject to the inhibition of the Eleventh Amendment to the Constitution of the United States, and likewise urged its second ground of demurrer, but the Circuit Court of Appeals, Gilbert, J., sustained the demurrer upon the first ground, viz: that the court did not have jurisdiction of the subject-matter of the action, and affirmed the judgment of the Circuit Court, dismissing the action. The present hearing is upon Writ of Error from this court, and again defendant in error presents the same grounds of demurrer as were presented to the courts below. In the meantime, however, Levi Rackliffe, the defendant in error, died, and W. S. Green was appointed as State Treasurer to fill the vacancy caused by said death and was substituted as defendant in error. Subsequently, and prior to the completion of the record in this court, W. S. Green was superseded in office by Truman Reeves, who assumed office January 1, 1899; Reeves was duly substituted as the defendant in error, and urges the objections as hereinabove stated.

POINTS, ARGUMENTS, AND AUTHORITIES.

FIRST POINT.

State of California the Real Party in Interest.

In is conceded that this action was brought under the authority of Section 3669 of the Political Code of California. (Plaintiff in Error, Brief, pp. 9–11.) That Section, in its entirety, as amended in 1891, and as it stood at the time the assessment for taxes complained of was made, is as follows:

"Each corporation, person or association, assessed by the State Board of Equalization, must pay to the State Treasurer, *upon the order of the Controller, as other moneys are required to be paid into the Treasury*, the State and county, and city and county, taxes each year levied upon the property so assessed to it or him by said Board. Any corporation, person or association, dissatisfied with the assessment made by the Board, upon the payment of the taxes due upon the assessment complained of, and the percentage added, if to be added, on or before the first Monday in June, *and the filing of notice with the Controller of an intention to begin an action*, may, not later than the first Monday in June, bring an action against the State Treasurer for the recovery of the amount of taxes and percentage so paid to the Treasurer, or any part thereof, and in the complaint may allege any fact tending to show the illegality of the tax, or of the assessment upon which the taxes are levied, in whole or in part. A copy of the complaint and of the summons must be served upon the Treasurer within ten days after the complaint has been filed, and the Treasurer has thirty days within which to demur or answer. *At the time the Treasurer demurs or answers, he may demand that the action be tried in the Superior Court of the County of Sacramento.* The Attorney-General must defend the action. *The provisions of the Code of Civil Procedure relating to pleadings, proofs, trials, and appeals are applicable to the proceedings herein provided for.* If the final judgment be against the Treasurer, upon presentation of a certified copy of such judgment to the Controller, *he shall draw his warrant upon the State Treasurer*, who must pay to the plaintiff the amount of the taxes so declared to have been illegally collected; *and the cost of such action, audited by the Board of Examiners, must be paid out of any money in the General Fund of the Treasury, which is hereby appropriated*, and the Controller may demand and receive from the county, or city and county, interested, the proportion of such costs, or may deduct such proportion from any money then or to become due to said county, or city and county. Such action must be begun on or before the first Monday in June of the year succeeding the year in which the taxes were levied, and a failure to begin such action is deemed a waiver of the rights of action." (Statutes of 1891, page 442.)

The title of this action is "C. W. Smith, *as* Receiver of the Atlantic & Pacific Railroad Company," against "Truman Reeves, *as* Treasurer of the State of California."

The Treasurer of the State of California is simply the custodian of money belonging to the State. It is his duty, under the law, "to receive and keep in the vaults of the State Treasury all moneys belonging to the State not required to be received and kept by some other person."

Subd. 1 of Sec. 452, Political Code.

He can receive no money into the Treasury unless accompanied by a certificate of the Controller, showing by whom the payment is to be made, the amount thereof, and the funds into which it is to be paid.

Secs. 453 and 434, and Subd. 11 of Sec. 433 of the Political Code.

He can pay out no money except upon warrant drawn by the Controller.

Subd. 4 of Sec. 452, Political Code.

No warrant can be drawn by the Controller unless authorized by law.

Subd. 16 of Sec. 433, Political Code.

The money sued for in this action was, under the provisions of Section 3669, *supra*, paid "to the State Treasurer upon the order of the Controller, *as other moneys are required to be paid into the Treasury*," and as *all* other moneys, due for State and county, and city and county taxes, "assessed by the State Board of Equalization," are paid. The payment was to the State, as other State moneys, and moneys of a like character, are paid, not to the Treasurer. It came into the Treasury through the regular channels provided by law; *and it is now in the Treasury mingled with other moneys of the State*, and is, in no sense, money wrongfully or illegally in the possession of the Treasurer. It cannot be in any way segregated or distinguished from the other moneys of the State in his custody. And it could only leave his custody in the regular manner authorized by law for the payment by him of State moneys, viz: upon a warrant drawn by another State officer, the Controller, who is not a party to this action.

From all of this it is manifest, beyond peradventure, that the real party defendant to this action is the State of California, and that the Treasurer has no personal interest whatever in the controversy, but defends solely as the State's representative.

In the case of *Georgia* vs. *Madrazo*, 26 U. S. (1 Pet.) 110, Mr. Chief Justice Marshall, in discussing the question as to whether the State is a party where its Governor is sued in his representative capacity, says, at page 123:

"The case made, in both the libel and claim, exhibits *a demand for money actually in the Treasury of the State, mixed up with its general funds*, and for slaves in possession of the Government. It is not alleged, nor is it the fact, that this money had been brought into the Treasury, or these Africans into the possession of the Executive, by any violation of an Act of Congress. The possession has been acquired by means which it was lawful to employ. The claim upon the Governor is as a Governor; he is sued, not by his name, but by his title. The demand made upon him is not made personally, but officially. The decree is

pronounced, not against the person, but the officer, and appears to have been pronounced against the successor of the original defendant, as the appeal bond was executed by a different Governor from him who filed the information. In such a case, where the chief magistrate of a State is sued, not by his name, but by his style of office, and the claim made upon him is entirely in his official character, we think the State itself may be considered as a party on the record. If the State is not a party, there is no party against whom a decree can be made. No person in his natural capacity is brought before the court as defendant. This not being a proceeding against the thing, but against the person, a person capable of appearing as defendant, against whom a decree can be pronounced, must be a party to the cause, before a decree can be regularly pronounced.

"But were it to be admitted that the Governor could be considered as a defendant, in his personal character, no case is made which justifies a decree against him personally. He has acted in obedience to a law of the State made for the purpose of giving effect to any Act of Congress, and has done nothing in violation of any law of the United States. The decree is not to be considered as made in a case in which the Governor was defendant in his personal character; nor could a decree against him, in that character, be supported."

See also—

Kentucky vs. *Dennison*, 24 How. 66;

Louisiana vs. *Jumel*, 107 U. S. 711;

Hagood vs. *Southern*, 117 U. S. 52-67;

In re Ayers, 123 U. S. 443-448;

Louisiana vs. *Steele*, 134 U. S. 230-232;

North Carolina vs. *Temple*, 134 U. S. 22;

U. S. vs. *Beebe*, 127 U. S. 344;

Penmayer vs. *McConnaughy*, 140 U. S. 1-9;

Reagan vs. *Farmers' Loan & Trust Co.*, 154 U. S. 388;

Belknap vs. *Schield*, 161 U. S. 10-22.

From the foregoing authorities, it seems perfectly clear that where the record discloses the fact that the nominal defendants have no personal interest in the subject-matter of the suit, but defend only as representing the State, the State is the real party in interest and the party against whom the relief is sought.

As was said by Mr. Justice Mathews, in *In re Ayers*, page 492, *supra*:

"Whether it (State of Virginia) is the actual party, in the sense of the prohibition of the Constitution, must be determined by a consideration of the nature of the case as presented on the whole record."

But counsel for plaintiff in error cite the case of *Osborn* vs. *Bank of United States*, 9 Wheaton, 738, and *Davis* vs. *Gray*, 16 Wall. 203, and the cases following these cases, as enunciating a contrary doctrine. This case has received the careful attention of this court in a number of well-considered cases, and the distinction between the doctrine of the respective cases very clearly pointed out.

In the case of *Louisiana* vs. *Jumel*, 107 U. S. 711-724, after stating the point of decision in the *Osborn* case, the court say, at page 725:

"Thus the money seized was kept out of the treasury, because if it got in it would be irretrievably lost to the bank, since the State could not be sued to recover it back. No one pretended that if the money had been actually paid into the treasury, and had become mixed with the other money there, it could have been got back from the State by a suit against the officers. They would have been individually liable for the unlawful seizure and conversion, but the recovery would be against them individually for the wrongs they had personally done, and

could have no effect on the money which was held by the State. Certainly no one would ever suppose that by a proceeding against the officers alone, they could be held as trustees for the bank, and required to set apart from the moneys in the treasury an amount equal to that which had been improperly put there, and hold it for the discharge of the liability which the State incurred by reason of the unlawful exaction."

Again, in *Hagood* vs. *Southern*, 117 U. S. 52-69, where the officers of the State of South Carolina were sued, in their representative capacity, to enforce an obligation of the State, Mr. Justice Mathews says, at page 69:

"A judgment against these latter, in their official and representative capacity, commanding them to perform official functions on behalf of the State according to the dictates and decrees of the court, is, if anything can be, a judicial proceeding against the State itself. If not, it may well be asked, what would constitute such a proceeding?

"In the present cases the decrees were not only against the defendants in their official capacity, but, that there might be no mistake as to the nature and extent of the duty to be performed, also against their successors in office."

The learned Justice then clearly outlines the principles which distinguish the case under discussion from the *Osborn* and similar cases.

In *In re Ayers*, 123 U. S. 443-487, Mr. Justice Mathews again explains and differentiates the doctrine, for which defendant in error contends, from that of the *Osborn* case, in very clear and concise language.

In the late case of *Reagan* vs. *Farmers' Loan & Trust Co.*, 154 U. S. 362-389, Mr. Justice Brewer, in speaking of the principle herein contended for by defendant in error, clearly states the line of demarcation between this principle and that contended for by plaintiff in error. He says, at page 389:

"In the application of this latter principle, two classes of cases have appeared in the decisions of this court, and it is in determining to which class a particular case belongs that differing views have been presented.

"The first class is where the suit is brought against the officers of the State, as representing the State's action and liability, and thus making it, though not a party to the record, the real party against which the judgments will so operate as to compel it to specifically perform its contracts. (*In re Ayers*, 123 U. S. 443; *Louisiana* vs. *Jumel*, 107 U. S. 711; *Antoni* vs. *Greenhow*, 107 U. S. 769; *Cunningham* vs. *Macon & Brunswick Railroad*, 109 U. S. 446; *Hagood* vs. *Southern*, 117 U. S. 52.)

"The other class is where a suit is brought against defendants who, claiming to act as officers of the State, and under the color of an unconstitutional statute, commit acts of wrong and injury to the rights and property of the plaintiff acquired under a contract with the State. Such suit, whether brought to recover money or property in the hands of such defendants, unlawfully taken by them in behalf of the State, or for compensation in damages, or, in a proper case where the remedy at law is inadequate, for an injunction to prevent such wrong and injury, or for a mandamus, in a like case, to enforce upon the defendant the performance of a plain, legal duty, purely ministerial—is not, within the meaning of the Eleventh Amendment, an action against the State. (*Osborn* vs. *Bank of the United States*, 9 Wheat. 738; *Davis* vs. *Gray*, 16 Wall. 203; *Tomlinson* vs. *Branch*, 15 Wall. 460; *Litchfield* vs. *Webster County*, 101 U. S. 773; *Allen* vs. *Baltimore & Ohio Railroad*, 114 U. S. 311; *Board of Liquidation* vs. *McComb*, 92 U. S. 531; *Poindexter* vs. *Greenhow*, 114 U. S. 270.)"

As was said by Mr. Justice Bradley in *Cararnia* vs. *Temple*, 134 U. S. 30, in speaking of this question: "We do not think it necessary to consider that question anew."

Thus, it will be seen that there can be no question that the plaintiff in error is, in fact, attempting to sue the State of California. Can this be done?

SECOND POINT.

The Eleventh Amendment.

The Eleventh Amendment to the Constitution of the United States, ratified January 8, 1798, reads as follows.

"The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State."

Prior to this amendment, it had been held, in the case of *Chisholm* vs. *Georgia*, 2 Dall. 419, that a State was liable to suit at the instance of a citizen of the State. As soon as this decision was announced, steps were taken to obtain an amendment to the Constitution withdrawing jurisdiction. This resulted in the proposal of the Eleventh Amendment above quoted, which was subsequently ratified by the requisite number of States.

New Hampshire vs. *Louisiana*, 108 U. S. 76.

And it was accordingly held that, unless a State consents, the amendment prohibits the courts of the United States from entertaining a cause in which one State seeks relief against another State on behalf of its citizens, in a matter in which the State prosecuting has no interest of its own.

So it has been uniformly held that, where an officer of a State has been sued in his representative capacity to enforce an obligation alleged to be due from the State, the courts of the United States, under the Eleventh Amendment, have no jurisdiction to hear or determine the cause, without the consent of the State.

Louisiana vs. *Jumel*, *supra;*
Hagood vs. *Southern*, *supra;*
In re Ayers, *supra;*
Louisiana vs. *Steele*, *supra;*
Reagan vs. *Farmers' Loan & Trust Co.*, *supra;*
Belknap vs. *Schield*, *supra.*

We quote from the opinion of Mr. Justice Brewer, in *Reagan* vs. *Farmers' Loan & Trust Co.*, 154 U. S. 388 (1893), as showing that this question is now settled beyond peradventure:

"We are met at the threshold with an objection that this is in effect a suit against the State of Texas, brought by a citizen of another State, and, therefore, under the Eleventh Amendment to the Constitution, beyond the jurisdiction of the Federal court. The question as to when an action against officers of a State is to be treated as an action against the State has been of late several times carefully considered by this court, especially in the cases of *In re Ayers*, 123 U. S. 443, by Mr. Justice Mathews, and *Pennoyer* vs. *McConnaughy*, 140 U. S. 1, by Mr. Justice Lamar. In the former of these cases it was said (p. 505):

"'To secure the manifest purposes of the constitutional exemption guaranteed by the Eleventh Amendment requires that it should be interpreted, not literally and too narrowly, but fairly, and with such breadth and largeness as effectually to accomplish the substance of its purpose. In this spirit it must be held to cover, not only suits brought against a State by name, but those also against its officers, agents, and representatives, where the State, though not named as such, is, never-

theless, the only real party against which alone in fact the relief is asked, and against which the judgment or decree effectively operates.'

"And in the latter (p. 9):

"'It is well settled that no action can be maintained in any Federal court by the citizens of one of the States against a State, without its consent, even though the sole object of such suit be to bring the State within the operation of the constitutional provision which provides that "no State shall pass any law impairing the obligation of contracts." This immunity of a State from suit is absolute and unqualified, and the constitutional provision securing it is not to be so construed as to place the State within the reach of the process of the court. Accordingly, it is equally well settled that a suit against the officers of a State, to compel them to do the acts which constitute a performance by it of its contracts, is, in effect, a suit against the State itself.'"

The cases cited by plaintiff in error on pages 9 and 10 of his brief only support the right of Federal corporations, as a general proposition, to bring actions in the Federal courts, or to have actions instituted against them in the State courts removed to the Federal courts. This is not the question presented to this court at this time. The question before the court is, *not* whether it has jurisdiction to hear and determine an action instituted by plaintiffs, as Receivers of the Atlantic & Pacific Railroad Company, a corporation chartered under the laws of the United States, against defendants, to whom there is no jurisdictional objection: *not* whether this court has jurisdiction over the plaintiffs; but whether or not it has any jurisdiction *over the defendant* in an action of this character. In other words, where the State, although not a party to the record, is, as a matter of fact, the real and only party in interest against whom the judgment asked, if obtained, would operate, and where the nominal defendant has no personal interest in the subject-matter of the action, but defends only as representing the State, is such an action within the prohibition of the Eleventh Amendment to the Constitution of the United States?

As clearly shown by the authorities hereinabove cited, such an action is within the inhibitions contained in the Eleventh Amendment.

Counsel for plaintiff in error assert, under Points I. and II., pages 9 to 14 of his brief, that under Section 2, Article III., of the Constitution of the United States, and an Act of Congress dated August 13, 1888 (25 U. S. Statutes, 433), that the Atlantic & Pacific Railroad Company, being a corporation created by the Act of Congress, has the right to assert any cause of action where the amount involved exceeds two thousand dollars, in any Circuit Court of the United States, against any party, regardless of citizenship of the parties to such action, and that under this principle a State may be made a defendant. All of the cases cited are cases wherein parties are sued in their private capacity. The doctrine contended for by plaintiff in error may be, and doubtless is, good law when applied to private parties; but it does not apply when a sovereign State is a party. All of the reasons which apply against the suing of a sovereign State, and on account of which the Eleventh Amendment was adopted, apply equally as well, on principle, to the procedure outlined by plaintiff in error. The application of this doctrine would merely be attaining by indirection that which this court has uniformly held could not be done directly. It would simply amount to permission to sue the State of California, without its consent. The doctrine has been frowned upon by this

court in the case of *Hans* vs. *Louisiana*, 134 U. S. 1, where this precise question was raised. Article III., Section 2, of the Constitution, and the Act of Congress regulating the practice in the Circuit Court, cited by plaintiff in error, were noticed and commented upon. We do not deem it necessary to quote from this case at length. The court squarely held, after an extensive review of the authorities, that a State cannot, without its consent, be sued in a Circuit Court of the United States, *even though the case is one which arises under the Constitution and laws of the United States.*

See also—

North Carolina vs. *Temple*, 134 U. S. 22-30.

In *United States* vs. *Texas*, 143 U. S. 644, the court say:

"It is admitted that these words do not refer to suits brought against a State by its own citizens or by citizens of other States, or by citizens or subjects of foreign States, even where such suits arise under the Constitution, laws, and treaties of the United States, because the judicial power of the United States does not extend to suits of *individuals* against States. (*Hans* vs. *Louisiana*, 134 U. S. 1, and authorities cited; *North Carolina* vs. *Temple*, 134 U. S. 22-30.)"

THIRD POINT.

Has the State of California Consented to be Sued?

In the case of *Beers* vs. *Arkansas*, 20 How. 527, 529, Mr. Chief Justice Taney said:

"It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission. But it may, if it think proper, waive this principle and permit itself to be made a defendant in a suit by individuals or by another State. And as this permission is altogether voluntary on the part of the sovereignty, it follows *that it may prescribe the terms and conditions on which* it consents to be sued, and the manner in which the suit shall be conducted, and may withdraw its consent whenever it may suppose that justice to the public requires it."

See also—

Hans vs. *Louisiana*, *supra*;
Ball vs. *Holsell*, 161 U. S. 83.

The provision of the statute of California, which waives this privilege of immunity from suit at the instance of a private party in the case under consideration, is to be found in Section 3669, Political Code, *supra*, and it is in this Section that plaintiff in error must find his authority to prosecute the suit.

In accordance with the principles announced, *supra*, what were the terms prescribed, and what were the conditions imposed upon which this consent to be sued was given? In what manner should the suit be conducted?

Complete answers are to be found in the portions of Section 3669, Political Code, *supra*, which we have italicized. They are:

First—The Treasurer may demand that the action be tried in the Superior Court of the County of Sacramento.

Second—The provisions of the Code of Civil Procedure relating to pleadings, proofs, trials, and appeals are applicable to the proceedings therein provided.

The State has the unquestioned right to select the forum in which it shall be sued, to prescribe the manner in which the suit shall be conducted, and to impose upon the prosecution of the action any condition that may be deemed proper. It may even retract its permission to be sued after an action has been commenced.

Railroad Co. vs. *Alabama*, 101 U. S. 32;
In re Ayers, 123 U. S. 505;
Hans vs. *Louisiana*, 134 U. S. 18;
Ball vs. *Holsell*, 161 U. S. 83.

Has the State consented to be sued in the Federal courts?

An examination of the provisions of Section 3669 shows that conditions are imposed which are wholly incompatible with a consent to be sued in the United States courts. A cause commenced in the Federal courts, sitting in California, could not be transferred from these courts to the Superior Courts of the State of California, in and for Sacramento County, if the Federal court had jurisdiction. Nor could the Federal courts conform to the provisions of the Code of Civil Procedure of the State of California relating to "pleadings, proofs, trials, and appeals." These provisions could have no application in a proceeding in the United States court.

Van Stone vs. *Stillwell*, 142 U. S. 133;
Fishburn vs. *Chicago etc. Co.*, 137 U. S. 60;
Mo. Pac. Ry. Co. vs. *Chicago etc. Co.*, 132 U. S. 191;
Hudson vs. *Parker*, 156 U. S. 281;
Delano vs. *Platte Co.*, 155 U. S. 221;
Chateaugay, Petitioner, 128 U. S. 545.

As said by Mr. Justice Gilbert, in rendering the opinion of the Circuit Court of Appeals in this cause:

"By this provision in regard to appeals, it was clearly the intention of the Legislature to make the Supreme Court of the State of California the court of last resort to pass upon all questions which might arise in such an action. It was intended that the rights of litigants in such a suit should be subject to the construction which that court should finally adopt. That provision secures to the State the most substantial right which is conserved to it in the section just quoted, and presents an insurmountable obstacle to the prosecution of the action in a court of the United States."

On pages 12 and 13 of his brief, counsel for plaintiff in error cites a large number of cases to the point that, inasmuch as Section 3669 of the Political Code authorized the institution of suits of this character in the State courts, the Federal courts cannot be deprived of jurisdiction to try such cases, by providing that they shall be tried only in the State courts. Plaintiff also cites the provisions of the Act of Congress giving the Federal courts jurisdiction "concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity."

Aside from the fact that this contention is disposed of by the case of *Hans* vs. *Louisiana*, *supra*, it is apparent that the vice of the position of plaintiff in error

is, that the Federal courts have no jurisdiction in actions brought against the State—that is expressly taken from them by the Eleventh Amendment. Therefore, Section 3669 of the Political Code does not deprive such courts of any jurisdiction whatever. The only effect of Section 3669, Political Code, was to confer upon certain persons a privilege which, without express authorization, they could not exercise in any form, viz: the privilege of suing the State. In conferring this privilege, the State had the right to prescribe the terms upon which it was to be exercised. It did so. One of those terms is that such suits *must be brought in the courts of the State.*

FOURTH POINT.

Assessment of the Rolling Stock.

From the statement of facts, it appears that plaintiff in error was the owner of the rolling stock assessed, and that said rolling stock ran over a railroad operated in more than one county of the State.

First—There can be no question but that the rolling stock of plaintiff in error may be taxed by the State of California.

American Refrigerator Co. vs. *Hall*, 174 U. S. 70;
Pullman's Car Co. vs. *Pennsylvania*, 141 U. S. 23;
Gloucester Ferry Co. vs. *Pennsylvania*, 114 U. S. 206;
Marye vs. *Baltimore & O. R. R. Co.*, 127 U. S. 117;
Frickeen vs. *Shelby Co.*, 145 U. S. 22.

Second—The scheme which the State has adopted for the taxation of this rolling stock is to be found in the following constitutional and statutory provisions:

Section 1, Article XIII., Constitution of California, reads as follows:

"All property in the State, not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law. * * * "

Section 10, Article XIII., of the same Constitution, reads as follows:

"All property, except as hereinafter in this section provided, shall be assessed in the county, city, city and county, town, township, or district in which it is situated, in the manner prescribed by law. The franchise, roadway, roadbed, rails, and rolling stock of all railroads operated in more than one county in this State, shall be assessed by the State Board of Equalization, at their actual value, and the same shall be apportioned to the counties, cities and counties, cities, towns, townships, and districts in which such railroads are located, in proportion to the number of miles of railway laid in such counties, cities and counties, cities, towns, townships, and districts."

Section 3628, Political Code, as it stood in 1891, so far as applicable, reads as follows:

"The franchise, roadway, roadbed, rails, and rolling stock of all railroads operated in more than one county in this State, shall be assessed by the State Board of Equalization, as hereinafter provided for. * * * "

Section 3664, Political Code (Statutes 1883, page 65), so far as applicable, reads as follows:

"The president, secretary, or managing agent, or such other officer as the State Board of Equalization may designate, of any corporation, * * * owning *or operating* any railroad in more than one county in this State, shall, on or before the first Monday in April of each year, furnish the said board a statement signed and sworn to by one of such officers * * * showing in detail for the year ending on the first Monday in March in each year,

1. The whole number of miles of railway in the State * * * owned *or operated* by such corporation, person, or association.

2. * * *

3. * * *

4. The number of each kind of all rolling stock used by such corporation * * in operating the entire railway, including the part without the State.

5. Number, kind, and value of rolling stock owned and operated in the State.

6. Number, kind, and value of rolling stock used in the State, but owned by the party making the returns."

Section 3665, Political Code (Statutes 1891, page 438):

"The State Board of Equalization must meet at the State Capitol on the third Monday in July. * * * At such meeting the board must assess the franchise, roadway, roadbed, rails, and rolling stock of all railroads operated in more than one county. * * * *Assessments must be made to the corporation* * * * *owning the same.* The depots, stations, shops, and buildings erected upon the space covered by the right of way and all other property owned by such person, corporation, * * * are assessed by the Assessor of the county wherein they are situate. * * * "

From the foregoing, it is apparent that the State has provided for two things:

1. Every kind of property in the State shall be taxed in proportion to its value, to be provided by law.

2. It has provided by law that the State Board of Equalization shall assess the rolling stock of all railroads operated in more than one county at their actual value and apportioned to the counties through which the railroad is operated.

The reason for this is that railroad rolling stock operated in more than one county should pay proportional tribute to each county through which such rolling stock runs, which result can only be accomplished by the assessment and apportionment of such rolling stock by some central body or board, whose jurisdiction is co-extensive with the entire State.

Mr. Justice McKinstry, in *S. F. & N. P. R. R. Co.* vs. *State Board*, 60 Cal. 12, makes it very clear that the State Board of Equalization is to make the assessment. He says, at page 29:

"We are at a loss to imagine how any statute could make the duty of the State Board any clearer than does this distinct and positive mandate of the Constitution. If any doubt could possibly be built upon the words cited, it would be dispelled by the first clause of the same section: 'All property, *except as hereinafter in this section provided*, shall be assessed *in* the county, city, city and county, town, township, or district in which it is situated, *in the manner prescribed by law.*' Thus, by the very language of the Constitution all other but the railroad property mentioned must be assessed by the local assessors, in the manner prescribed by statute; the railroad property must be assessed in the manner prescribed by the sections of the Constitution. (8 Pac. L. J. 103.) That is, by the State Board without the aid of statute."

Here, then, we find the precise fact contemplated by the Constitution, viz: plaintiff in error operating a railroad in more than one county and running rolling stock owned by it over the railroad so operated.

Plaintiff in error thus states the fact, on page 6 of his brief:

"During all the time that the Atlantic & Pacific Railroad Company operated this leased line, it used some portion of its own rolling stock upon it. The rolling stock was never permanently in it (the State) and consisted of cars and locomotives, etc., running in and out of the State constantly and never permanently stopping in the State."

Third—The quotation by counsel for plaintiff from the decision of the Supreme Court of this State in *People* vs. *C. P. R. R. Co.*, 105 Cal. 576, must be read in the light of the question before that court for determination, and the facts of that particular case.

There the Central Pacific Railroad Company was the owner of an entire railway, and of all of its appurtenances. That railway was operated in more than one county in this State, and the Board of Equalization, in accordance with law, assessed to that company the "franchise, roadway, roadbed, rails, and rolling stock" owned by it. The assessment was made upon a lump sum valuation of all the property. Therefore, *under such circumstances*, the items so assessed constituted "an entirety incapable of division," so that if, as was contended in that case, the Federal franchise of the company had been included in the assessment, and that portion of the assessment for that reason had been void, the whole assessment being incapable, *under the circumstances*, of segregation or division, would have fallen, *i. e.*, the record in the case showed that the State Board of Equalization had, as a fact, assessed the franchise, railway, roadbed, rails, and rolling stock as an entirety. The appellant claimed that this assessment included a Federal franchise, which could not be taxed, but the court held that it must be presumed that the assessment was upon property within the jurisdiction of the board, and they could not, under the record, segregate the various items which made up the assessment as disclosed by the record, and cut out any portion of the assessment. That, however, is not the case here. The Atlantic & Pacific Railroad Company owned rolling stock operated over a line of railroad within this State; but it did not own the franchise, the roadway, the roadbed, nor the rails. The property of each corporation operating over this line of road was assessed to its respective owners: to the Atlantic & Pacific all that it owned, (certain rolling stock); to the Southern Pacific, its rolling stock, and the franchise, roadway, roadbed, and rails. The assessment, in each instance, was properly made.

It was not intended by Section 10, Article XIII., of the Constitution, nor by Section 3665 of the Political Code, that the assessment by the State Board of Equalization of the franchise, etc., of a railway company should be an indivisible entirety *in law*, unless it was so *in fact*. It was certainly never intended that where a company owned one only of the assessable items enumerated, (as in the present instance), the fact that it did not own the others should relieve it from taxation upon the one which it did own. Such a contention is without any reason on the face of it, and is in direct contradiction of Section 1, Article XIII., of the

California Constitution, which provides that *all* property (not exempt under the laws of the United States) shall be taxed. The rolling stock of the Atlantic & Pacific Railroad Company is *not* an indivisible part of the railroad of the Southern Pacific Railroad Company. It stands alone, separate and apart from any and all other property, is easily ascertainable and assessable, without regard to the property of the Southern Pacific Railroad Company, and was properly and legally so assessed.

To urge that the Constitution and Sections of the Political Code, prescribing the duties of the Board of Equalization in this behalf, indicated an intention to confine the assessments made by the board to *railroads* as an entirety only, and that, therefore, no procedure is prescribed for the assessment of rolling stock when owned apart from the railroad corporation owning the franchise, roadbed, roadway over which it operated, etc., is the extreme of technicality.

The franchise, roadway, roadbed, rails, and rolling stock of a railroad are not an entirety. While its franchise may not be sold without statute authority, and there is no statute authority in this State in this particular class of cases—(*Gregory* vs. *Blanchard*, 98 Cal. 311), yet its rolling stock may be attached and sold under execution.

Humphreys vs. *Hopkins*, 81 Cal. 551;
Dinsmore vs. *Racine Co.*, 12 Wis. 725-33;
Baston vs. *Gilmore*, 37 N. H. 410; 72 A. D. 336;
Col. vs. *Columbus Co.*, 10 Ohio St. 372; 75 A. D. 518;
Arthur vs. *Com. Ry. Co.*, 9 Swedes & M. 394; 48 A. D. 719,
Freeman on Exec., Sec. 126a.

If an entirety, why the enumeration in Section 3664, Political Code, *supra*.

Fourth—Counsel for plaintiff in error say, on page 21 of brief:

"It is the rolling stock of a railroad, and not the rolling stock used on any railroad operated in more than one county in the State, that is to be assessed by the State Board of Equalization."

Counsel's error consists in attempting to convert the descriptive phrase "of a railroad" into a statement of ownership. A railroad "owns" nothing, but is, itself, "owned." Nor is there any statutory direction that rolling stock "of a railroad" should be assessed to a *railroad*. On the contrary, the specific direction of the statute (Sec. 3665 Political Code—Statutes 1891, page 438) is that such rolling stock shall be assessed *to the corporation, person, or association, owning the same.*

RECAPITULATION.

1. A suit against an officer in his representable capacity, as disclosed by the record herein, is a suit against the State of California.

2. Under the Eleventh Amendment to the Constitution of the United States, a sovereign State cannot be sued without its consent.

3. The State of California has not consented to be sued in the courts of the United States by a private individual.

4. The State Board of Equalization had jurisdiction to, and in fact was the only body that could, assess the rolling stock of a railroad operated in more than one county of the State.

Respectfully submitted.

TIREY L. FORD, Attorney-General of California,
GEORGE A. STURTEVANT, Deputy Attorney-General, and
WILLIAM M. ABBOTT, Deputy Attorney-General,
Attorneys for Defendant in Error.

AFFIDAVIT OF SERVICE BY MAIL.

C. W. Smith etc
Plaintiff in Error
vs. No. 922
Truman Reeves, etc
Defendant in Error

STATE OF CALIFORNIA,
City and County of San Francisco } ss.

George Francis (Name of affiant.) being duly sworn, deposes and says: That he is a citizen of the United States, over the age of eighteen years, and is not a party to this action, and that he resides at San Francisco (City or town.), County of San Francisco, State of California; that C. N. Sterry (Name of opposing counsel.) is the attorney of record of the above-named Plaintiff (Appellant or Respondent.) in said cause, and that he resides at Los Angeles (City or town.), in the County of Los Angeles, State of California; and that in each of said two places there is a United States Post Office, and between said two places there is a regular daily (Daily, weekly, etc.) communication by mail; that on the 10th day of March, 1900, deponent served a true copy of Brief of Defendant in Error (Name of instrument.) herein, of which this is the original, on said C. N. Sterry (Name of opposing counsel.), attorney for Plaintiff (Appellant or Respondent.) by depositing such copy aforesaid on this date, in the Post Office at San Francisco (City or town.), aforesaid, properly inclosed in an envelope, addressed to said C N Sterry (Name of opposing counsel.), at Los Angeles (City or town.) his place of business (Business or residence.), and prepaying the postage thereon. And deponent further sayeth not. George Francis

Subscribed and sworn to before me, this 10th day of March, 1900.

Chas. P. Gale
Clerk to Attorney General of California

SMITH *v.* REEVES.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 242. Argued April 16, 1900.—Decided May 14, 1900.

Within the meaning of the constitutional provisions relating to actions instituted by private persons against a State, this suit, though in form against an officer of the State of California, is in fact against the State itself.

By § 3669 of the Political Code of California, which provides that any person dissatisfied with the assessment made upon him by the State Board of Equalization, may, after payment and on the conditions named in the act, bring an action against the State Treasurer for the recovery of the amount of taxes and percentage so paid to the Treasurer, or any part thereof, the State has not consented to be sued except in its own courts.

It was competent for the State to couple with its consent to be sued on account of taxes alleged to have been exacted under illegal assessments made by the state board, the condition that the suit be brought in one of its own courts.

A suit brought against a State by one of its citizens is excluded from the judicial power of the United States, even when it is one arising under the Constitution and laws of the United States, and the same rule applies to suits of a like character brought by Federal corporations against a State without its consent.

THE case is stated in the opinion.

Mr. C. N. Sterry for plaintiff in error.

Mr. Tirey L. Ford and *Mr. William M. Abbott* for defendant in error. *Mr. George A. Sturtevant* was on their brief.

MR. JUSTICE HARLAN delivered the opinion of the court.

THIS action was brought in the Circuit Court of the United States for the Northern District of California by the Receivers of the Atlantic and Pacific Railroad Company, a corporation created under an act of Congress approved July 27, 1866,

with authority to construct and maintain a railroad and telegraph line beginning at or near Springfield, Missouri, thence by a specified route to the Pacific Ocean. 14 Stat. 292, c. 278.

The original defendant was J. R. McDonald, as Treasurer of the State of California. He was succeeded in office by Levi Rackliffe, W. S. Green and Truman Reeves in the order named.

The relief sought was a judgment against the defendant "*as Treasurer* of the State of California," for the sum of $2272.80 with interest thereon from the date of the payment of that sum or any portion thereof to the State Treasurer, together with the costs of the action.

Before bringing suit the Receivers of the Railroad Company gave written notice to the Comptroller of the State that they intended to bring an action against the State Treasurer to recover from him the amount of the "taxes paid by the Atlantic and Pacific Railroad Company, and by the Receiver for it, to the State Treasurer as and for taxes assessed against the Atlantic and Pacific Railroad Company in the State of California for the year 1893, by the State Board of Equalization."

The action was brought under section 3669 of the Political Code of California, which is as follows:

"Each corporation, person or association assessed by the State Board of Equalization must pay to the State Treasurer, upon the order of the Comptroller, as other moneys are required to be paid into the Treasury, the state and county and city and county taxes each year levied upon the property so assessed to it or him by said board. Any corporation, person or association dissatisfied with the assessment made by the board, upon the payment of the taxes due upon the assessment complained of, and the percentage added, if to be added, on or before the first Monday in June, and the filing of notice with the Comptroller of an intention to begin an action, may, not later than the first Monday in June, bring an action against the State Treasurer for the recovery of the amount of taxes and percentage so paid to the Treasurer, or any part thereof, and in the complaint may allege any fact tending to show the illegality of the tax, or of the assessment upon which the taxes are levied, in whole or in part. A copy of the complaint and of the sum-

mons must be served upon the Treasurer within ten days after the complaint has been filed, and the Treasurer has thirty days within which to demur or answer. At the time the Treasurer demurs or answers, he may demand that the action be tried *in the Superior Court of the county of Sacramento.* The Attorney General must defend the action. The provisions of the Code of Civil Procedure relating to pleadings, proofs, trials and appeals are applicable to the proceedings herein provided for. If the final judgment be against the Treasurer, upon presentation of a certified copy of such judgment to the Comptroller, he shall draw his warrant upon the State Treasurer, who must pay to the plaintiff the amount of taxes so declared to have been illegally collected; and the cost of such action, audited by the Board of Examiners, must be paid out of any money in the general fund of the treasury, which is hereby appropriated, and the Comptroller may demand and receive from the county, or city and county interested, the proportion of such costs, or may deduct such proportion from any money then or to become due to said county, or city and county. Such action must be begun on or before the first Monday in June of the year succeeding the year in which the taxes were levied, and a failure to begin such action is deemed a waiver of the right of action."

The State Treasurer, represented by the Attorney General of the State, demurred to the complaint upon various grounds affecting the merits of the case, and also moved to dismiss the case upon the ground that the Circuit Court had no jurisdiction of the defendant or of the action.

The demurrer was sustained with leave to amend and the motion to dismiss was denied. *Reinhart* v. *McDonald, Treas'r*, 76 Fed. Rep. 403.

An amended complaint was filed but a demurrer to it was sustained, with leave to amend. No further amendment having been filed, the action was dismissed by the Circuit Court. *Smith* v. *Rackliffe*, 83 Fed. Rep. 983. That judgment was affirmed in the Circuit Court of Appeals. 59 U. S. App. 428.

Is this suit to be regarded as one against the State of California? The adjudged cases permit only one answer to this question. Although the State, as such, is not made a party de-

fendant, the suit is against one of its officers *as Treasurer;* the relief sought is a judgment against that officer *in his official capacity;* and that judgment would compel him to pay out of the public funds in the treasury of the State a certain sum of money. Such a judgment would have the same effect as if it were rendered directly against the State for the amount specified in the complaint. This case is unlike those in which we have held that a suit would lie by one person against another person to recover possession of specific property, although the latter claimed that he was in possession as an officer of the State and not otherwise. In such a case, the settled doctrine of this court is that the question of possession does not cease to be a judicial question—as between the parties actually before the court—because the defendant asserts or suggests that the right of possession is in the State of which he is an officer or agent. *Tindal* v. *Wesley*, 167 U. S. 204, 221, and authorities there cited. In the present case the action is not to recover specific moneys in the hands of the State Treasurer nor to compel him to perform a plain ministerial duty. It is to enforce the liability of the State to pay a certain amount of money on account of the payment of taxes alleged to have been wrongfully exacted by the State from the plaintiffs. Nor is it a suit to enjoin the defendant from doing some positive or affirmative act to the injury of the plaintiffs in their persons or property, but one in effect to compel the State, through its officer, to perform its promise to return to taxpayers such amount as may be adjudged to have been taken from them under an illegal assessment.

The case, in some material aspects, is like that of *Louisiana* v. *Jumel*, 107 U. S. 711, 726–728. That was a proceeding by mandamus against officers of Louisiana to compel them to use the public moneys in the state treasury for the retirement of certain bonds issued by the State but which it subsequently refused to recognize as valid obligations and directed its officers not to pay. This court said: "It may be, without doubt, easily ascertained from the accounts how much of the money on hand is applicable to the payment of this class of debts; but the law nowhere requires the setting apart of this fund any more than

others from the common stock. In the treasury all funds are mingled together, and kept so until called for to meet specific demands. . . . The remedy sought, in order to be complete, would require the court to assume all the executive authority of the State, so far as it related to the enforcement of this law, and to supervise the conduct of all persons charged with any official duty in respect to the levy, collection and disbursement of the tax in question until the bonds, principal and interest, were paid in full, and that, too, in a proceeding in which the State, as a State, was not and could not be made a party. It needs no argument to show that the political power cannot be thus ousted of its jurisdiction and the judiciary set in its place. When a State submits itself, without reservation, to the jurisdiction of a court in a particular case, that jurisdiction may be used to give full effect to what the State has by its act of submission allowed to be done; and if the law permits coercion of the public officers to enforce any judgment that may be rendered, then such coercion may be employed for that purpose. But this is very far from authorizing the courts, when a State cannot be sued, to set up its jurisdiction over the officers in charge of the public moneys, so as to control them as against the political power in their administration of the finances of the State. In our opinion, to grant the relief asked for in either of these cases would be to exercise such a power."

We are clearly of opinion that within the meaning of the constitutional provisions relating to actions instituted by private persons against a State, this suit, though in form against an officer of the State, is against the State itself. *In re Ayers*, 123 U. S. 443; *Pennoyer* v. *McConnaughy*, 140 U. S. 1, 10.

But it is contended that by the section of the Political Code of California above quoted the State has consented that its Treasurer may be sued in respect of the matters specified in that section, and it is argued that this case comes within the decision in *Beers* v. *Arkansas*, 20 How. 527, 529, in which it was said to be an established principle of jurisprudence in all civilized nations that while the sovereign cannot be sued in its own courts or in any other without its consent and permission, a State "may, if it thinks proper, waive this privilege, and permit itself to be

made a defendant in a suit by individuals or by another State." So in *Clark* v. *Barnard*, 108 U. S. 436, 447: "The immunity from suit belonging to a State, which is respected and protected by the Constitution within the limits of the judicial power of the United States, is a personal privilege which it may waive at pleasure; so that in a suit, otherwise well brought, in which a State had sufficient interest to entitle it to become a party defendant, its appearance in a court of the United States would be a voluntary submission to its jurisdiction; while, of course, those courts are always open to it as a suitor in controversies between it and citizens of other States."

It is quite true the State has consented that its Treasurer may be sued by any party who insists that taxes have been illegally exacted from him under assessments made by the State Board of Equalization. But we think that it has not consented to be sued except in one of its own courts. This is not expressly declared in the statute, but such, we think, is its meaning. The requirement that the aggrieved taxpayer shall give notice of his suit to the Comptroller, and the provision that the Treasurer may at the time he demurs or answers "demand that the action be tried in the Superior Court of the county of Sacramento," indicate that the State contemplated proceedings to be instituted and carried to a conclusion only in its own judicial tribunals. If a Circuit Court of the United States can take cognizance of an action of this character, the right given to the Treasurer by the local statute to have the case tried in the Superior Court of Sacramento County would be of no value; for, as the jurisdiction and authority of a Circuit Court of the United States depends upon the Constitution and laws of the United States, it could not refuse to take cognizance of the case if rightfully commenced in it and to proceed to final decree, nor could it, merely in obedience to the laws of the State, transfer it to a state court upon the demand of the State Treasurer. A Federal court can neither take nor surrender jurisdiction except pursuant to the Constitution and laws of the United States.

In *Beers* v. *Arkansas*, above cited, it was further said: "As this permission [to be sued] is altogether voluntary on the part of the sovereignty, it follows that it may prescribe the terms

and conditions on which it consents to be sued, and the manner in which the suit shall be conducted, and may withdraw its consent whenever it may suppose that justice to the public requires it. Arkansas, by its constitution, so far waived the privilege of sovereignty as to authorize suits to be instituted against it in its own courts, and delegated to its General Assembly the power of directing in what courts, and in what manner, the suit might be commenced. And if the law of 1854 had been passed before the suit was instituted, we do not understand that any objection would have been made to it. The objection is that it was passed after the suit was instituted, and contained regulations with which the plaintiff could not conveniently comply. But the prior law was not a contract. It was an ordinary act of legislation, prescribing the conditions upon which the State consented to waive the privilege of sovereignty. It contained no stipulation that these regulations should not be modified afterwards, if, upon experience, it was found that further provisions were necessary to protect the public interest; and no such contract can be implied from the law, nor can this court inquire whether the law operated hardly or unjustly upon the parties whose suits were then pending. That was a question for the consideration of the legislature. They might have repealed the prior law altogether, and put an end to the jurisdiction of their courts in suits against the State, if they had thought proper to do so, or prescribe new conditions upon which the suits might still be allowed to proceed. In exercising this latter power the State violated no contract with the parties; it merely regulated the proceedings in its own courts, and limited the jurisdiction it had before conferred in suits when the State consented to be a party defendant."

In support of the broad proposition that the State could not restrict its consent to be sued to actions brought in its own courts, counsel refer to *Railway Company* v *Whitton*, 13 Wall. 270, 286; *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S. 362, 391, and *Smyth* v. *Ames*, 169 U. S. 466, 516.

Railway Company v. *Whitton* related to a statute of Wisconsin, giving a right of action, in certain circumstances, where the death of a person was caused by the wrongful act, neglect

or default of another person or of a corporation, and which statute provided that the action should be brought in some court established under the constitution and laws of the State. This court held that in all cases where a general right was thus conferred, "it can be enforced in any Federal court within the State having jurisdiction of the parties. It cannot be withdrawn from the cognizance of such Federal court by any provision of state legislation that it shall only be enforced in a state court. . . . Whenever a general rule as to property or personal rights, or injuries to either, is established by state legislation, its enforcement by a Federal court in a case between proper parties, is a matter of course, and the jurisdiction of the court, in such case, is not subject to state limitation."

Reagan v. *Farmers' Loan & Trust Co.* was an action by a New York corporation against the railroad commissioners of Texas and others to enjoin the enforcement of certain railroad rates established by the statutes of Texas. This court said: "Nor can it be said in such a case that relief is obtainable only in the courts of the State. For it may be laid down as a general proposition that, whenever a citizen of a State can go into the courts of the State to defend his property against the illegal acts of its officers, a citizen of another State may invoke the jurisdiction of the Federal courts to maintain a like defence. A State cannot tie up a citizen of another State, having property rights within its territory invaded by unauthorized acts of its own officers, to suits for redress in its own courts. Given a case where a suit can be maintained in the courts of the State to protect property rights, a citizen of another State may invoke the jurisdiction of the Federal courts."

Smyth v. *Ames* was a suit in the Circuit Court of the United States against the members of the State Board of Transportation of Nebraska and other persons and corporations, to enjoin the enforcement of certain rates established by a statute of that State for railroads. In that case it was insisted that the relief sought could only be had in an action brought in the Supreme Court of Nebraska, such being the remedy provided by the statute there in question. That provision, it was contended, took from the Circuit Court of the United States its

equity jurisdiction in respect of the rates prescribed, and required the dismissal of the bills. This court said: "We cannot accept this view of the equity jurisdiction of the Circuit Courts of the United States. The adequacy or inadequacy of a remedy at law for the protection of the rights of one entitled upon any ground to invoke the powers of a Federal court is not to be conclusively determined by the statutes of the particular State in which suit may be brought. One who is entitled to sue in the Federal Circuit Court may invoke its jurisdiction in equity whenever the established principles and rules of equity permit such a suit in that court, and he cannot be deprived of that right by reason of his being allowed to sue at law in a state court on the same cause of action. It is true that an enlargement of equitable rights arising from the statutes of a State may be administered by the Circuit Courts of the United States. *Case of Broderick's Will*, 21 Wall. 503, 520; *Holland* v. *Challen*, 110 U. S. 15, 24; *Dick* v. *Foraker*, 155 U. S. 404, 415; *Bardon* v. *Land and River Improv. Co.*, 157 U. S. 327, 330; *Rich* v. *Braxton*, 158 U. S. 375, 405. But if the case in its essence be one cognizable in equity, the plaintiff, the required value being in dispute, may invoke the equity powers of the proper Circuit Court of the United States whenever jurisdiction attaches by reason of diverse citizenship or upon any other ground of Federal jurisdiction. *Payne* v. *Hook*, 7 Wall. 425, 430; *McConihay* v. *Wright*, 121 U. S. 201, 205. A party, by going into a national court, does not, this court has said, lose any right or appropriate remedy of which he might have availed himself in the state courts of the same locality; that the wise policy of the Constitution gives him a choice of tribunals. *Davis* v. *Gray*, 16 Wall. 201, 221; *Cowley* v. *Northern Pacific Railroad Co.*, 158 U. S. 569, 583." In *Smyth* v. *Ames* the court distinctly reaffirmed what was said upon this point in *Reagan* v. *Farmers' Loan & Trust Co.*

These cases do not control the determination of the present question. The *Whitton* suit was wholly between private parties, and involved no question as to the State or the powers or acts of state officers. In the *Reagan* and *Smyth* cases the relief sought was against the proposed action of state officers or

agents, and they were not in any sense suits against the State—the relief asked being protection against affirmative action about to be taken by state officers in hostility to the rights of the respective plaintiffs.

In the present case the suit was one to compel an officer of the State, by affirmative action on his part, to perform or comply with the promise of the State as defined in its Political Code, and therefore, as we have said, it is a suit against the State. Nothing heretofore said by this court justifies the contention that a State may not give its consent to be sued in its own courts by private persons or by corporations, in respect of any cause of action against it and at the same time exclude the jurisdiction of the Federal courts—subject always to the condition, arising out of the supremacy of the Constitution of the United States and the laws made in pursuance thereof, that the final judgment of the highest court of the State in any action brought against it with its consent may be reviewed or reëxamined, as prescribed by the act of Congress, if it denies to the plaintiff any right, title, privilege or immunity secured to him and specially claimed under the Constitution or laws of the United States.

In our judgment it was competent for the State to couple with its consent to be sued on account of taxes alleged to have been exacted under illegal assessments made by the state board, the condition that the suit be brought in one of its own courts. Such legislation ought to be deemed a part of the taxing system of the State, and cannot be regarded as hostile to the General Government, or as touching upon any right granted or secured by the Constitution of the United States. If the California statute be construed as referring only to suits brought in one of its own courts, it does not follow that injustice will be done to any taxpayer whose case presents a Federal question. For, if he be denied any right, privilege or immunity secured by the Constitution or laws of the United States and specially set up by him, the case can be brought here upon writ of error from the highest court of the State.

Again, it is contended that a State cannot claim exemption from suit by a corporation created by Congress—as was the

Atlantic and Pacific Railroad Company—for purposes authorized by the Constitution and laws of the United States. This contention rests upon the ground that the Eleventh Amendment—which was passed because of the decision in *Chisholm* v. *Georgia*, 2 Dall. 419—only declares that the judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States "by citizens of another State, or by citizens or subjects of any foreign State," and does not forbid an action against a State by a corporation created by Congress. It is further said that although the present case may not be embraced by the clause of section 2, article III, of the Constitution, extending the judicial power of the United States to controversies "between a State and citizens of another State" and to controversies "between a State, or the citizens thereof, and foreign States, citizens or subjects," this suit having been brought by a Federal corporation created for national purposes, *Osborn* v. *U. S. Bank*, 9 Wheat. 738; *California* v. *Central Pacific Railroad*, 127 U. S. 1; *Northern Pacific Railroad Co.* v. *Amato*, 144 U. S. 465, is embraced by the clause of the same article extending the judicial power of the United States, in express words, "to *all* cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority."

If the Constitution be so interpreted it would follow that any corporation created by Congress may sue a State in a Circuit Court of the United States upon any cause of action, whatever its nature, if the value of the matter in dispute is sufficient to give jurisdiction. We cannot approve this interpretation.

This question is controlled by the principles announced in *Hans* v. *Louisiana*, 134 U. S. 1, 10, 14, 16–21. That was an action brought in the Circuit Court of the United States by a citizen of Louisiana against that State. It was a case that could be said to have arisen under the Constitution of the United States; and the contention was that the Eleventh Amendment did not exclude from the jurisdiction of the Circuit Court a suit brought against a State by one of its own citizens, provided it was one arising under the Constitution or laws of the United States.

In the opinion in that case, delivered by Mr. Justice Bradley, reference was made to the question involved in *Chisholm* v. *Georgia*, and to what had been said by leading statesmen, prior to the adoption of the Constitution, in support of the general proposition that sovereignty could not, without its consent, be brought to the bar of any court at the suit of private parties or corporations. This court said: "That a State cannot be sued by a citizen of another State, or of a foreign State, on the mere ground that the case is one arising under the Constitution or laws of the United States, is clearly established by the decisions of this court in several recent cases. *Louisiana* v. *Jumel*, 107 U. S. 711; *Hagood* v. *Southern*, 117 U. S. 52; *In re Ayers*, 123 U. S. 443. Those were cases arising under the Constitution of the United States, upon laws complained of as impairing the obligation of contracts, one of which was the constitutional amendment of Louisiana complained of in the present case. Relief was sought against state officers who professed to act in obedience to those laws. This court held that the suits were virtually against the States themselves and were consequently violative of the Eleventh Amendment of the Constitution, and could not be maintained. It was not denied that they presented cases arising under the Constitution; but, notwithstanding that, they were held to be prohibited by the Amendment referred to."

Referring to certain observations made by Hamilton, Madison and Marshall, in refutation of the doctrine that States were liable to suits, the court also said: "It seems to us that these views of those great advocates and defenders of the Constitution were most sensible and just; and they apply equally to the present case as to that then under discussion. The letter is appealed to now, as it was then, as a ground for sustaining a suit brought by an individual against a State. The reason against it is as strong in this case as it was in that. It is an attempt to strain the Constitution and the law to a construction never imagined or dreamed of. Can we suppose that, when the Eleventh Amendment was adopted, it was understood to be left open for citizens of a State to sue their own State in the Federal courts, whilst the idea of suits by citizens of other

States, or of foreign States, was indignantly repelled? Suppose that Congress, when proposing the Eleventh Amendment, had appended to it a proviso that nothing therein contained should prevent a State from being sued by its own citizens in cases arising under the Constitution or laws of the United States, can we imagine that it would have been adopted by the States? The supposition that it would is almost an absurdity on its face."

Again: "The suability of a State without its consent was a thing unknown to the law. This has been so often laid down and acknowledged by courts and jurists that it is hardly necessary to be formally asserted. . . . 'It may be accepted as a point of departure unquestioned,' said Mr. Justice Miller, in *Cunningham* v. *Macon & Brunswick Railroad*, 109 U. S. 446, 451, 'that neither a State nor the United States can be sued as defendant in any court in this country without their consent, except in the limited class of cases in which a State may be made a party in the Supreme Court of the United States by virtue of the original jurisdiction conferred on this court by the Constitution.' Undoubtedly a State may be sued by its own consent, as was the case in *Curran* v. *Arkansas et al.*, 15 How. 304, 309, and in *Clark* v. *Barnard*, 108 U. S. 436, 447. The suit in the former case was prosecuted by virtue of a state law which the legislature passed in conformity to the constitution of that State. But this court decided, in *Beers et al.* v. *Arkansas*, 20 How. 527, 529, that the State could repeal that law at any time; that it was not a contract within the terms of the Constitution prohibiting the passage of state laws impairing the obligation of a contract. . . . It is not necessary that we should enter upon an examination of the reasons or expediency of the rule which exempts a sovereign State from prosecution in a court of justice at the suit of individuals. This is fully discussed by writers on public law. It is enough for us to declare its existence."

The present plaintiffs, as did the plaintiffs in *Hans* v. *Louisiana*, base the argument in support of their right to sue the State in the Circuit Court of the United States upon the mere letter of the Constitution. We deem it unnecessary to repeat

or enlarge upon the reasons given in *Hans* v. *Louisiana* why a suit brought against a State by one of its citizens was excluded from the judicial power of the United States, even when it is one arising under the Constitution and laws of the United States. They apply equally to a suit of that character brought against the State by a corporation created by Congress. Such a suit cannot, consistently with the Constitution, be brought within the cognizance of a Circuit Court of the United States without the consent of the State. It could never have been intended to exclude from Federal judicial power suits arising under the Constitution or laws of the United States when brought against a State by private individuals or state corporations, and at the same time extend such power to suits of like character brought by Federal corporations against a State without its consent.

The Circuit Court entertained jurisdiction of the cause and dismissed the bill. The Circuit Court of Appeals held that the Circuit Court erred in holding jurisdiction, but affirmed the order of dismissal upon the ground of want of jurisdiction in the latter court to take cognizance of such a case as is here presented. We approve the action of the Circuit Court of Appeals, and its judgment is

Affirmed.